SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 66

CASE-SWAYNE CO., INC., PETITIONER,

vs.

SUNKIST GROWERS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

No. 333-58 PH

CASE-SWAYNE CO., INC. a corporation, Plaintiff,

v.

SUNKIST GROWERS, INC., a corporation, THE EXCHANGE ORANGE PRODUCTS COMPANY, a corporation, THE EXCHANGE LEMON PRODUCTS COMPANY, a corporation, Defendants.

COMPLAINT FOR DAMAGES—Filed April 15, 1958

Comes now the plaintiff and complains against the defendants and for cause of action alleges:

I.

Jurisdiction and Venue

1. This action arises under the Act of July 2, 1890, Chapter 647, Sections 1 and 2, 26 Stat. 209, commonly known as the "Sherman Act"; Act of October 15, 1914, Chapter 323 Sections 1, 2, 4 and 12, 38 Stat. 730, 731, 736; Act of June 19, 1936, Chapter 592 Section 1, 49 Stat. 1526; (15 U.S.C., Sections 1, 2, 12, 13, 15, and 22 respectively) as hereinafter more fully appears.

2. The alleged unlawful acts and violations hereinafter alleged and described, including the combination and conspiracy to restrain trade and commerce among the several [fol. 2] States of the United States, and the combination and conspiracy to monopolize a substantial part of the trade and commerce among the several States of the United

[File endorsement omitted]

States, and the discrimination in prices between different purchasers of commodities in interstate commerce, have been, and are, conceived, carried out, and made effective in part within the Southern District of California. The defendant Sunkist Growers, Inc., is found, has an agent, and transacts business within said district.

II.

Description of Plaintiff and Plaintiff's Business

3. The plaintiff Case-Swayne Co., Inc., is a corporation existing under and by virtue of the laws of the State of Nevada. Since on or about plaintiff's existence in 1945 plaintiff has established the business of purchasing by-product citrus fruit as hereinafter defined, consisting principally of by-product Valencia oranges, but also including by-product Navel oranges and by-product grapefruit, and the manufacturing of the same into such products as canned orange juice, canned grapefruit juice, and blends of canned juices consisting of blends of orange and grapefruit juice, orange and pineapple juice, and grapefruit and pineapple juice. Plaintiff has during all the times mentioned herein, marketed, sold and shipped said products in interstate commerce to retail markets and other outlets for resale. Products manufactured from by-product citrus fruit, including canned citrus juices, and canned blends of the same and also including citrus juice concentrates are herein referred to as "citrus fruit products." By-product citrus fruit used in the manufacture of said products is citrus fruit that is sometimes called "waste fruit" which by reason of appearance, size or other factors cannot be profitably marketed as fresh fruit. The phrase "by-product citrus fruit" when used in this complaint refers to by-product Valencia [fol. 3] and Navel oranges and by-product grapefruit, which, as aforesaid are the by-product citrus fruits that are used by plaintiff in its business. The business of plaintiff in purchasing by-product citrus fruit and manufacturing the same into citrus fruit products as aforesaid, and the

selling and shipping of said products in interstate commerce for resale, is hereinafter referred to in this complaint as plaintiff's citrus fruit products business. Since the existence of plaintiff in 1945, plaintiff has invested approximately $200,000.00 in the construction of a manufacturing plant and facilities for the operation and carrying on of its citrus fruit products business, and during all of the times of the acts and conduct of defendants and co-conspirators hereinafter complained of, has had manufacturing equipment with the capacity to utilize approximately 30,000 tons per year of by-product citrus fruit for manufacturing into citrus fruit products.

III.

Description of Defendants and Co-Conspirators

4. Defendant Sunkist Growers, Inc., is a non-stock membership corporation, organized and authorized to do business under the laws of the State of California, and is herein sometimes referred to as Sunkist. Its immediate members consist of approximately eighteen district exchanges, each of which, plaintiff is informed and believes, and therefore alleges the fact to be, has a member that is a director of Sunkist. Said district exchanges are composed of approximately 160 local associations or local exchanges, each of which operates a member packing-house for the purpose of harvesting citrus fruit, and putting it in shape to be marketed. Said local associations and local exchanges consist of approximately 12,000 growers of citrus fruit in the California-Arizona citrus fruit market as hereinafter defined. Said defendant Sunkist, said district exchanges, said local exchanges or local associations and said growers of citrus fruit, when referred to collectively in this complaint [fol. 4] will be referred to as "the Sunkist family". Agreements among the Sunkist family members provide for the marketing by defendant Sunkist of citrus fruit, (including by-product citrus fruit, by and through its subsidiary, defendant The Exchange Orange Products Company) and

citrus fruit products manufactured from by-product citrus fruit grown by the Sunkist family; plaintiff is informed and believes and therefore alleges the fact to be that said citrus fruit produced by the Sunkist family, is all produced in California and Arizona and is citrus fruit, including by-product citrus fruit, of the California-Arizona market, which market is hereinafter defined in this complaint.

5. Defendant The Exchange Orange Products Company is a corporation organized and existing under the laws of California. The plaintiff is informed and believes and therefore alleges the fact to be that said defendant The Exchange Orange Products Company is a wholly owned subsidiary of defendant Sunkist. Said defendant The Exchange Orange Products Company will sometimes hereinafter be referred to as Exchange Orange. Defendant Exchange Orange conducts the business of manufacturing by-product citrus fruit into citrus fruit products including the citrus fruit products manufactured by plaintiff, and also including concentrates for commercial use in beverages for soft drink manufacturers. The canned citrus fruit products manufactured by defendant Exchange Orange are sold and shipped by defendant Sunkist in retail markets and other outlets in interstate commerce for resale in competition with plaintiff in its citrus fruit products business. Defendant Exchange Orange also sells for Sunkist by-product citrus fruit not manufactured by defendant Exchange Orange into citrus fruit products.

6. Defendant Exchange Lemon Products Company is a corporation organized and existing under and by virtue of [fol. 5] the laws of California. Its stock is owned by associations affiliated with Sunkist which handle lemons. Its principal business is the manufacturing of citrus fruit products from by-product lemons of its stockholders. Said defendant is sometimes herein referred to as Exchange Lemon.

7. *Co-Conspirator Hyland-Stanford Company.* Hyland-Stanford Company is a corporation and is herein named as

co-conspirator with defendants. Hyland-Stanford has facilities for manufacturing citrus fruit products from by-product citrus fruit.

8. *Co-Conspirator General Foods Corporation.* General Foods Corporation is a corporation and is herein named as a co-conspirator. The Bireleys Division of General Foods Corporation has facilities for manufacturing citrus fruit products from by-product citrus fruit.

9. *Co-Conspirator Cold Gold Company.* Cold Gold Company is herein named as a co-conspirator and plaintiff is informed and believes and therefore alleges the fact to be that said company is a corporation. During 1957 and in prior years, Cold Gold Company purchased by-product citrus fruit from defendant Exchange Orange in the same manner and on the same basis as did plaintiff. Plaintiff is informed and believes and therefore alleges the fact to be that during the year 1957 defendant Exchange Orange sold said co-conspirator orange juice which had been extracted by defendant Exchange Orange, at such a price as to constitute an indirect price discrimination against plaintiff in sales to plaintiff of by-product citrus fruit as hereinafter more fully alleged.

IV.

Products and Markets.

10. *By-product Citrus Fruit of the California-Arizona Market.* Substantially all the citrus fruit marketed in the United States, is produced in California, Arizona, Florida and Texas. By-product citrus fruit grown in California and Arizona is herein referred to as "by-product citrus [fol. 6] fruit of the California-Arizona market". By-product citrus fruit of the California-Arizona market is a separate and distinct market of by-product citrus fruit and the only economical market available to plaintiff, and others similarly situated, for the purchase of by-product citrus fruit for operation of plaintiff's citrus fruit products business. Other markets for by-product citrus fruit are

not available to plaintiff by reason of the fact that transportation costs of by-product citrus fruit from such other markets make it impossible for plaintiff to compete at a profit with manufacturers of citrus fruit products located within or adjacent to such other markets.

11. *Control of By-Product Citrus Fruit of the California-Arizona Market.* During all the times and acts herein complained of, defendants Sunkist and Exchange Orange have maintained and controlled a monopoly of by-product citrus fruit of the California-Arizona market. Said defendants have controlled approximately 70 percent of said by-product citrus fruit. Of the remaining 30% of said by-product citrus fruit, approximately 22 percent is utilized by the growers or by companies associated with said growers by contract or otherwise, leaving a balance of approximately 8 percent of said by-product citrus fruit available to plaintiff and other independent manufacturers of citrus fruit products similarly situated from said California-Arizona market. Plaintiff at all times herein complained of and during all times since the establishing of plaintiff's citrus fruit products business has been dependent upon defendants Sunkist and Exchange Orange for obtaining by-product citrus fruit in sufficient supply for the successful continuation of plaintiff's citrus fruit products business.

12. *Control of the Trade of Citrus Fruit Products Manufactured from By-Product Citrus Fruit of the California-Arizona Market.* Defendant Sunkist has at all times herein complained of, marketed all citrus fruit products manu- [fol. 7] factured by defendant Exchange Orange from by-product citrus fruit of the California-Arizona market. It sells and ships said products among the various states for resale and is a competitor of plaintiff in plaintiff's citrus fruit products business. During the time of all the acts and conduct of defendants and co-conspirators herein complained of, it has marketed the majority of all the citrus fruit made from by-product citrus fruit of the California-Arizona market and its control of said trade has increased

and is increasing by reason of the acts and conduct of defendants and co-conspirators herein complained of.

V.

Interstate Commerce

13. By-product citrus fruit of the California-Arizona market is sold and shipped in interstate commerce and involves a continual stream of interstate commerce between California and Arizona. Citrus fruit products manufactured from by-product citrus fruit of the California-Arizona market are shipped and sold in interstate commerce and involve a continual stream of interstate commerce throughout the various States of the United States.

VI.

Violations of Antitrust Laws

14. Within three years last past, defendants and co-conspirators have done the following acts and have been guilty of the following conduct:

Defendants and co-conspirators have combined and entered into contracts and have conspired to restrain the trade and commerce among the several states in by-product citrus fruit of the California-Arizona market and in citrus fruit products manufactured from by-product citrus fruit of the California-Arizona market. Defendants Sunkist and Exchange Orange have conspired with themselves and with defendant Exchange Lemon and co-conspirators in order to [fol. 8] monopolize the trade and commerce amongst the several states in by-product citrus fruit of the California-Arizona market and in citrus fruit products manufactured from by-product citrus fruit of the California-Arizona market. Defendants Sunkist and Exchange Orange have attempted to monopolize and have monopolized the trade and commerce among the several states in by-product citrus fruit of the California-Arizona market and in citrus fruit products manufactured from by-product citrus fruit of the

California-Arizona market. Defendants Sunkist and Exchange Orange did monopolize and attempt to monopolize the trade and commerce amongst the several states in by-product citrus fruit of the California-Arizona market to such an extent that the price of by-product oranges in said market has been unduly enhanced. Defendants Exchange Orange and Sunkist have indirectly discriminated in prices in the sale of by-product oranges of the California-Arizona market between different purchasers of said by-product oranges of like grade and quality. That said products involved are in interstate commerce and are sold for resale within the United States. That all of said acts and conduct were done by defendants and co-conspirators for the purpose of eliminating plaintiff as a competitor of Sunkist in plaintiff's citrus fruit products business.

15. That within three years last past, pursuant to and to effectuate said conspiracies and monopolies and attempts to monopolize as above alleged and with the purpose and design of limiting and eliminating the supply of by-product citrus fruits of the California-Arizona market available to plaintiff and others similarly situated and to prevent plaintiff from operating at a profit and to eliminate plaintiff as competitor of defendants Sunkist and Exchange Orange in plaintiff's citrus fruit products business, defendants and co-conspirators have done the following acts and have entered into the following agreements and conspiracies:

(a) Defendants did agree and conspire among themselves [fol. 9] that defendant Exchange Lemon would manufacture for defendants Sunkist and Exchange Orange citrus fruit products from by-product citrus fruit of the California-Arizona market at a fee basis in order to limit the supply of by-product citrus fruit available to plaintiff and others similarly situated. Pursuant to said agreement and conspiracy defendant Exchange Lemon did manufacture citrus fruit products from said by-product citrus fruit for defendants Sunkist and Exchange Orange at a fee basis.

(b) Defendant Sunkist and defendant Exchange Orange did agree and conspire with co-conspirator Hyland-Stanford for said co-conspirator to manufacture for defendants Sunkist and Exchange Orange citrus fruit products from by-product citrus fruit of the California-Arizona market at a fee basis in order to limit the supply of said by-product citrus fruit available to plaintiff and others similarly situated. That pursuant to said agreement and conspiracy, said co-conspirator Hyland-Stanford did manufacture citrus fruit products from said by-product citrus fruit for defendants Sunkist and Exchange Orange at a fee basis.

(c) Defendants Sunkist and Exchange Orange did agree and conspire with co-conspirator General Foods Corporation for said co-conspirator to manufacture for defendants Sunkist and Exchange Orange citrus fruit products from by-product citrus fruit of the California-Arizona market at a fee basis in order to limit the supply of by-product citrus fruit available to plaintiffs and others similarly situated; that pursuant to said agreement and conspiracy said co-conspirator did manufacture citrus fruit products for defendants Sunkist and Exchange Orange at a fee basis.

(d) Plaintiff is informed and believes and therefore alleges the fact to be that defendant Sunkist repre- [fol. 10] sented to the U. S. Department of Agriculture, that there was surplus production of by-product oranges from the California-Arizona market and offered to sell orange juice made from the same to the U. S. Department of Agriculture for what is known as the "school lunch program". Plaintiff is informed and believes and therefore alleges the fact to be that defendant Sunkist urged the purchase of said orange juice made from said by-product oranges. The fact is. there was no surplus of by-product oranges from said market as all could have been utilized by companies in the citrus fruit products business such as plaintiff. Pursuant to said representations Sunkist did sell or-

ange juice to the U. S. Department of Agriculture made from by-product oranges of the California-Arizona market. Plaintiff is informed and believs and therefore alleges the fact to be that the return from such sale was substantially lower than could have been obtained had the by-product oranges from which the orange juice was made been sold on the market to such independent dealers as plaintiff in the citrus fruit products business.

Arizona market. Plaintiff is informed and believes and (e) Defendant Sunkist did prevent plaintiff from obtaining by-product oranges of the California-Arizona market from Placentia Orange County Exchange which plaintiff had contracted and agreed to purchase from said Placentia Orange County Exchange. With respect to this transaction plaintiff alleges: Placentia Orange County Exchange is a member of the Sunkist family. In 1957 plaintiff was obtaining oranges from Placentia Orange County Exchange under an agreement with said Exchange for the 1957 season. Before the season was over said Exchange refused to perform under this agreement; plaintiff is informed and believes and therefore alleges the fact to be that the reason for said lack [fol. 11] of performance was that defendant Sunkist would not permit said Exchange to perform and remain a member of the Sunkist family.

(f) Plaintiff is informed and believes and therefore alleges the fact to be that sometime in the season of 1957, defendant Sunkist brought pressure to bear on the members of the Sunkist family to prevent any member from selling by-product citrus fruit to independent companies such as plaintiff. Plaintiff is informed and believes and therefore alleges the fact to be that defendant Sunkist did threaten to terminate its Sunkist marketing agreement with any of its family members that might by any method sell by-product citrus fruit to independent companies.

(g) Plaintiff is informed and believes and therefore alleges the fact to be that defendants Sunkist and Ex-

change Orange conspired and agreed with co-conspirator Cold Gold Company for said company to indirectly purchase from Exchange Orange by-product oranges produced in the California-Arizona market at discriminatory prices, viz: Plaintiff is informed and believes and therefore alleges the fact to be that said defendants did sell to said co-conspirator said by-product oranges at discriminatory prices by the device of extracting the juice and selling the juice to said con-conspirator at prices which were discriminatory in consideration of the cost to defendants of extracting the juices and the price charged for said juice as extracted.

(h) During the year 1956 defendants Sunkist and Exchange Orange manipulated the prices of by-product citrus fruit of the California-Arizona market and citrus fruit products made from the same with the design and purpose of forcing plaintiff and others similarly situated to sell citrus fruit products at a loss. With respect to this price manipulation, plaintiff al- [fol. 12] leges as follows: During the year 1956 Exchange Orange sold by-product citrus fruit only on a bid basis, by calling for bids from plaintiff and other citrus fruit products manufacturers on such by-product citrus fruit as Exchange Orange offered for sale. After plaintiff had made its purchases and commitments for purchase of by-product citrus fruit for the 1956 season Sunkist lowered its prices during said season on citrus fruit products it sold in competition with plaintiff to such an extent that if plaintiff had sold its citrus fruit products at competitive prices plaintiff would have necessarily suffered a substantial loss on the sale of said citrus fruit products.

16. Plaintiff does not know the exact times and places of the acts and conduct of defendants and co-conspirators above complained of but such information is within the knowledge of defendants and co-conspirators.

VII.

Damages

17. That by reason of the acts and conduct of defendants and co-conspirators as above alleged, plaintiff has been and now is unable to obtain by-product citrus fruit in quantities sufficient to enable it to continue plaintiff's citrus fruit products business at a profit. That as aforesaid, plaintiff since the year 1945 has established itself in its said business and has from said time until the said acts of defendants and co-conspirators complained of, established a profitable business. That by reason of the acts and conduct of the defendants and co-conspirators, plaintiff's citrus juice business has been destroyed and plaintiff has been unable to conduct said business at a profit. That by reason of the above facts herein alleged in this complaint plaintiff has lost profits, been damaged in its citrus fruit products busi-
[fol. 13] ness and its property and in the loss of future profits it reasonably could have anticipated, in the amount of $800,000.00.

Wherefore plaintiff prays for judgment for damages in the sum of $800,000.00, and prays that said damages be trebled pursuant to Section 4 of Act of October 15, 1914, Chapter 323, 38 Stat. 731 (15 U.S.C. Section 15) making a total judgment in the amount of $2,400,000.00, for costs of suit, and a reasonable attorneys fee.

Dated this 14th day of April, 1958.

Respectfully submitted,

J. Edward Johnson, W. Glenn Harmon, William H. Henderson.

Demand for Jury Trial

Plaintiff does hereby demand a jury trial in the above cause.

J. Edward Johnson, W. Glenn Harmon, William H. Henderson.

[fol. 155]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

No. 333-58 WB

CASE-SWAYNE CO. INC., Plaintiff,

v.

SUNKIST GROWERS, INC., *et al.*, Defendants.

DEFENDANTS' ANSWER TO COMPLAINT—Filed July 21, 1958

Now come the defendants, Sunkist Growers, Inc., (hereinafter sometimes referred to as "Sunkist"), The Exchange Orange Products Company (hereinafter sometimes referred to as Exchange Orange), and Exchange Lemon Products Company (hereinafter sometimes referred to as Exchange Lemon), and in answer to the complaint herein jointly and severally state:

• • • • • • •

[fol. 169]

Third Defense

19. Defendants are agricultural cooperative marketing associations meeting the requirements of both Section 6 of the Clayton Act (15 USC Section 17) and the Capper-Volstead Act (7 USC Sections 291, 292); and their claimed violations of law are exempt from the antitrust laws by said statutes.

• • • • • • •

[fol. 170] Dated: July 18, 1958.

Allen F. Mather, Donald D. Stark, Roy H. Mann,
By Donald D. Stark, Attorneys for Defendants.

[File endorsement omitted]

[fol. 222]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION
No. 333-58 WB

CASE-SWAYNE CO., INC., a corporation, Plaintiff,

v.

SUNKIST GROWERS, INC., a corporation, THE EXCHANGE ORANGE PRODUCTS COMPANY, a corporation, and EXCHANGE LEMON PRODUCTS COMPANY, a corporation, Defendants.

NOTICE OF MOTION TO DISMISS AS TO DEFENDANTS EXCHANGE ORANGE AND EXCHANGE LEMON—Filed November 3, 1958

To:

J. Edward Johnson, W. Glenn Harmon, 1400 Central Tower, 703 Market Street, San Francisco 3, California.

William H. Henderson, Suite 1010-1011 Boston Bldg., Salt Lake City 11, Utah.

PLEASE TAKE NOTICE that on the 17th day of November, 1958, at 9:45 A.M., or as soon thereafter as counsel can be heard, defendants will move the court as follows:

(a) To dismiss this action as to defendants The Exchange Orange Products Company and Exchange Lemon Products Company; and

[fol. 223]

(b) For an order amending the title of this action to conform to said dismissal.

[File endorsement omitted]

The said motion will be based upon this notice, the motion papers attached hereto, and the pleadings on file in the above entitled action.

Dated: November 1, 1958.

Allen F. Mather, Donald D. Stark, Roy H. Mann,
By Donald D. Stark, Attorneys for Defendants.

[fol. 224]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

No. 333-58 WB

CASE-SWAYNE CO., INC., a corporation, Plaintiff,

v.

SUNKIST GROWERS, INC., a corporation, THE EXCHANGE ORANGE PRODUCTS COMPANY, a corporation, and EXCHANGE LEMON PRODUCTS COMPANY, a corporation, Defendants.

STATEMENT OF REASONS IN SUPPORT OF MOTION TO DISMISS AS TO TWO DEFENDANTS—Filed November 3, 1958

This motion by defendants to dismiss this action as to defendants The Exchange Orange Products Company and Exchange Lemon Products Company is based upon the following facts and circumstances:

(1) On October 31, 1958 The Exchange Orange Products Company, a wholly owned subsidiary, was merged into Sunkist Growers, Inc. By reason of said merger, pursuant to Section 1215 of the California Agricultural Code and Section 4124 of the California Corporations Code, said Sunkist

[fol. 225] Growers, Inc. acquired all of the estate, property, rights, privileges and franchises and assumed all of the liabilities and obligations of The Exchange Orange Products Company. The separate corporate existence of The Exchange Orange Products Company thereupon ceased.

(2) On October 31, 1958 Exchange Lemon Products Company merged into Sunkist Growers, Inc. By reason of said merger, pursuant to Section 1215 of the California Agricultural Code and the General Corporation Laws, all of its rights and property were succeeded to and all of its obligations assumed by the surviving corporation, Sunkist Growers, Inc. The separate corporate existence of Exchange Lemon Products Company thereupon ceased.

(3) Attached hereto is the affidavit of D. M. Anderson, Secretary of Sunkist Growers, Inc., certifying to the aforesaid merger.

Dated: November 1, 1958.

Allen F. Mather, Donald D. Stark, Roy H. Mann,
By Donald D. Stark, Attorneys for Defendants.

[fol. 226]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

No. 333-58 WB

CASE-SWAYNE CO., INC., a corporation, Plaintiff,

v.

SUNKIST GROWERS, INC., a corporation, THE EXCHANGE ORANGE PRODUCTS COMPANY, a corporation, and EXCHANGE LEMON PRODUCTS COMPANY, a corporation, Defendants.

AFFIDAVIT OF D. M. ANDERSON IN SUPPORT OF MOTION TO DISMISS AS TO TWO DEFENDANTS—Filed November 3, 1958

County of Los Angeles,
State of California, *ss.*:

D. M. ANDERSON being first duly sworn, deposes and says:

1. I am the duly elected and acting secretary of Sunkist Growers, Inc., the California cooperative marketing corporation named as defendant in the above entitled action.

2. I certify that on October 31, 1958, there was filed with the Secretary of State of the State of California all documents necessary and proper to accomplish the merger of [fol. 227] The Exchange Orange Products Company and Exchange Lemon Products Company into said Sunkist Growers, Inc., pursuant to the General Corporation Laws of the State of California.

D. M. Anderson.

Subscribed and sworn to before me this 1st day of November, 1958.

Helen L. Cleary, Notary Public in and for said County and State. My Commission expires September 22, 1961.

(SEAL)

[fol. 228]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

No. 333-58 WB

CASE-SWAYNE CO., INC., a corporation, Plaintiff,

v.

SUNKIST GROWERS, INC., a corporation, THE EXCHANGE ORANGE PRODUCTS COMPANY, a corporation, and EXCHANGE LEMON PRODUCTS COMPANY, a corporation, Defendants.

POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS AS TO TWO DEFENDANTS—Filed November 3, 1958

1. The effect of merger under the California Corporation Laws is that the assets and liabilities of the constituent corporations are acquired and assumed by the surviving corporation.

Calif. Corp. Code Sections 4116 and 4124.

2. Where the surviving corporation is already a party defendant there is a substitution by operation of law and [fol. 229] it would be futile and unnecessary to continue the action to judgment against a merged defendant. The only effective judgment would be that binding the survivor corporation.

Dated: November 1, 1958

Calif. Corp. Code Section 4116.

Allen F. Mather, Donald D. Stark, Roy H. Mann,
By Donald D. Stark, Attorneys for Defendants.

[fol. 611]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

No. 333-58 WB

CASE-SWAYNE CO., INC., Plaintiff,

v.

SUNKIST GROWERS, INC., Defendant.

ORDER DISMISSING DEFENDANTS THE EXCHANGE ORANGE PRODUCTS COMPANY AND EXCHANGE LEMON PRODUCTS COMPANY—Entered December 5, 1958

Defendants having moved to dismiss as to defendants The Exchange Orange Products Company and Exchange Lemon Products Company on the ground that they have been merged into defendant Sunkist Growers, Inc., and the parties having filed appropriate memoranda and the court having heard this matter, and it appearing that defendants The Exchange Orange Products Company and Exchange Lemon Products Company have merged into defendant Sunkist Growers, Inc.

It Is Hereby Ordered that defendants The Exchange [fol. 612] Orange Products Company and Exchange Lemon Products Company be dismissed from this action.

Dated: December 5, 1958.

Wm. M. Turner
Judge

Approved as to form pursuant to Local Rule 7.

W. G. Harmon, for Attorneys for Plaintiff.

[File endorsement omitted]

[fol. 1078]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

No. 333-58 S

CASE-SWAYNE CO., INC., a corporation, Plaintiff,

vs.

SUNKIST GROWERS, INC., Defendant.

SUPPLEMENTAL COMPLAINT—Lodged March 20, 1962 and Filed June 29, 1962

Comes Now the plaintiff in the above entitled cause, and upon leave of Court, duly obtained, files this Supplemental Complaint, to supplement the complaint filed April 15, 1958 by setting forth and pleading transactions, occurrences and events which have happened since the filing of the complaint on April 15, 1958, and seeking supplemental relief with respect thereto:

1. Defendant Sunkist Growers, Inc. shall herein be referred to as Sunkist. The Exchange Orange Products Company, a corporation, shall herein be referred to as Exchange Orange. Exchange Lemon Products Company, a corporation, shall herein be referred to as Exchange Lemon. The phrase orange products business refers to the business of manufacturing orange products (such as, but not exclusively, canned orange juice and blends of same) from product oranges, and selling said orange products for resale. Product oranges refers to oranges sold or utilized [fol. 1079] for manufacture into orange products.

[File endorsement omitted]

2. That since and from April 15th, 1958 to October 31st, 1958, Sunkist and Exchange Orange continued to combine, contract and conspire with each other to restrain trade in product oranges of the California-Arizona market and products manufactured therefrom in violation of Section 1 of the Sherman Act. That since and from April 15th, 1958 to October 31st, 1958, Sunkist and Exchange Orange continued to combine and conspire to monopolize trade in product oranges of the California-Arizona market and products manufactured therefrom in violation of Section 2 of the Sherman Act. That since and from April 15th, 1956 to October 31st, 1958 Sunkist and Exchange Lemon continued to contract, combine and conspire to restrain trade in product oranges of the California-Arizona market and products manufactured therefrom in violation of Section 1 of the Sherman Act. That since and from April 15th, 1958 to and including October 31st, 1958, Sunkist and Exchange Lemon did combine, and conspire to monopolize trade in product oranges of the California market and products manufactured therefrom in violation of Section 2 of the Sherman Act. That since and from April 15, 1958 to October 31st, 1958, Exchange Orange continued to attempt to monopolize the trade and products manufactured therefrom in violation of Section 2 of the Sherman Act. That since and from April 15, 1958 to October 31st, 1958 Exchange Orange continued to monopolize trade in product oranges in the California-Arizona market and products manufactured therefrom in violation of Section 2 of the Sherman Act. That on or about October 31st, 1958, Sunkist, Exchange Orange and Exchange Lemon merged into a single corporation, viz, defendant Sunkist Growers, Inc., whereby Sunkist acquired the assets of Exchange Orange and Exchange Lemon and all of the obligations of Exchange Orange and Exchange Lemon were assumed by Sunkist. Said merger constituted a conspiracy and combination to restrain and monopolize trade in product oranges of the California-[fol. 1080] Arizona market and products therefrom in viola-

tion of Sections 1 and 2 of the Sherman Act, and also the effect of such merger was to tend to create a monopoly of such trade in violation of Section 7 of the Clayton Act. That since and from April 15, 1958, Sunkist has and continues to attempt to monopolize trade in product oranges of the California-Arizona market and products manufactured therefrom and continues to contract, combine and conspire to restrain and monopolize trade in product oranges in violation of Sections 1 and 2 of the Sherman Act. That since and from April 15, 1958, Sunkist has monopolized and continues to monopolize trade in product oranges of the California-Arizona market and products therefrom in violation of Section 2 of the Sherman Act.

3. Since and from April 15, 1958, pursuant to and to effectuate said conspiracies, combinations, monopolies and attempts to monopolize, as above alleged, and with the purpose and design of limiting and eliminating the supply of product oranges from California and Arizona available to plaintiff and others similarly situated, and to eliminate plaintiff and others similarly situated from the orange products business, Sunkist, Exchange Orange and Exchange Lemon have done and Sunkist continues to do, predatory acts which have decreased and limited the quantity of product oranges plaintiff could obtain from plaintiff's orange products business. The acts and conduct of Exchange Orange herein mentioned were done with the understanding, consent and acquiescence and agreement of Sunkist, and the acts and conduct of Sunkist herein mentioned were done with the understanding and agreement and acquiescence of Exchange Orange. There was a continuing understanding between Sunkist and Exchange Orange with respect to marketing of product oranges and orange products. That said acts by and with respect to Exchange Orange and Exchange Lemon took place from April 15, 1958 to October 31, 1958, when said defendants merged with Sunkist. Sunkist at all times from April 15, 1958 has continued to do [fol. 1081] said acts, and does now continue to do said acts. That said acts are as follows:

(a) Sunkist has solicited, negotiated and entered into and there presently exist, exclusive dealing contracts between Sunkist and other corporations in California and Arizona called District Exchanges, and certain corporations, individuals and partnerships herein called Citrus Packing Houses, who pick, wash, grade, and pack oranges for orange growers. The Citrus Packing Houses agree to maintain in force appropriate agreements between themselves and orange growers, providing for delivery to Citrus Packing Houses, of all oranges grown by the growers, and the said Citrus Packing Houses agree to market such oranges through the District Exchanges and Sunkist. The District Exchanges agree to market all such oranges through Sunkist. Sunkist is agent in all matters concerning the marketing of said oranges. Sunkist has enforced said agreements and forced Citrus Packing Houses and District Exchanges to market oranges controlled by them exclusively through Sunkist.

(b) From April 15th, 1958 Sunkist has controlled and Sunkist continues to control, from approximately 69% to 75% of all oranges grown in California and Arizona, and has controlled and Sunkist continues to control approximately the same percentage of said oranges utilized as product oranges from California and Arizona. By reason of this combined control of oranges from California and Arizona Sunkist has continued to have the power to control the prices of product oranges from California and Arizona, to limit the supply of said oranges to plaintiff and others similarly situated, to manipulate the prices of said oranges, and to increase the percent of oranges marketed as fresh fruit. Sunkist has exercised this power to decrease the supply of product oranges available to plaintiff and others similarly situated.

(c) Sunkist and Exchange Lemon continue to conspire for Exchange Lemon to manufacture orange and grapefruit products for Sunkist on a cost basis which permitted Sun- [fol. 1082] kist and Exchange Orange to utilize more prod-

uct oranges and thus limit and squeeze the supply available to plaintiff and others similarly situated.

(d) Since the merger of Sunkist, Exchange Orange and Exchange Lemon, above mentioned Sunkist has carried on the manufacturing and other activities that had been carried on by Exchange Orange and Exchange Lemon, including acts to limit the supply of product oranges to plaintiff. By reason of the merger Sunkist became a manufacturer of orange products and more effectively utilized the manufacturing facilities formerly owned by Exchange Lemon and Exchange Orange to manufacture orange products and thus reduced the supply of product oranges to plaintiff and others similarly situated. Sunkist has also handled sale of product oranges to independent manufacturers of orange products at such times as product oranges controlled by Sunkist were sold.

4. Plaintiff does not know the exact times and places of the acts and conduct of Sunkist, Exchange Orange and Exchange Lemon herein complained of nor of other transactions, occurrences or events which have happened since April 15, 1958 in violation of the antitrust laws herein alleged. Such facts are within the peculiar knowledge of Sunkist, the surviving corporation of Sunkist, Exchange Orange and Exchange Lemon.

5. That as alleged herein, Sunkist's acts in violation of the antitrust laws are continuing and plaintiff is threatened with continued loss of profits in its orange products business unless injunctive relief is ordered by this Court.

6. That by reason of the acts and conduct of Sunkist, Exchange Orange and Exchange Lemon in so limiting the quantities of product oranges plaintiff could have obtained and utilized in its orange products business, plaintiff has lost profits plaintiff otherwise would have made in said business from April 15, 1958 to January 31, 1962, in the sum of approximately $1,412,000, in addition to damages suffered by plaintiff to April 15th, 1958.

[fol. 1083] Wherefore, plaintiff prays for judgment against Sunkist as follows:

1. For damages caused by acts of defendant from April 15th, 1958 to January 31st, 1962, in the sum of $1,412,000.00, in addition to the damages plaintiff suffered to April 15, 1958, and plaintiff prays that said damages be trebled pursuant to Section 4 of the Act of October 15th, 1914, Chapter 323, 38 Stat. 731 (15 U.S.C.A. Sec. 15) making a total additional judgment in the amount of $4,236,000.00.

2. For injunctive relief by the Court pursuant to Sec. 16 of Act of October 15th, 1914, Ch. 323, 38 St. 737 (15 U.S. C.A. Sec. 26) ordering and enjoining Sunkist from continuing its acts in violation of the antitrust laws herein complained of.

3. For reasonable attorneys fees and costs.

Dated this 19th day of March, 1962.

J. Edward Johnson, W. Glenn Harmon, William H. Henderson, By W. Glenn Harmon, Attorneys for Plaintiff.

[fol. 1084] Certificate of Service (omitted in printing).

[fol. 1084a]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

Honorable Harry C. Westover, Judge Presiding.

No. 333-58 HW Civil

CASE-SWAYNE CO., INC., a corporation, Plaintiff,

vs.

SUNKIST GROWERS, INC., Defendant.

Transcript of Proceedings—March 2, 1964

Los Angeles, California

* * * * * *

[fol. 1084b] Mr. Hufstedler: I agree, your Honor, but before we do that, may we define for a moment the scope of

this argument, because I think it is important in this proceeding. The stipulation before the court on this matter that you are now discussing was drafted prior to the filing of the supplemental pleading, so that that stipulation covers the first three years we are talking about.

Just prior to our argument here today we were discussing with Mr. Henderson how we should best resolve that problem so that this Court's determination would cover the [fol. 1084c] entire issues before the court, and Mr. Henderson suggested, I think quite appropriately, that we agree that the facts as stated in your present stipulation are substantially identical to the present facts, that is, there has been no material change, with one exception, and that is that in 1958, as the pleadings before the court show, there was an actual merger in Sunkist, so that Exchange Orange and Exchange Lemon did cease their independent corporate existence and became a part of the Sunkist Corporation itself as a formal matter.

Beyond that, we believe the facts are identical and I would like to suggest that we include that matter at this time so that before we dispose of that Capper-Volstead matter we have a clear understanding that we are talking about the entire period before the court and not just a limited period.

Mr. Henderson: Counsel has stated me correctly. I did propose that and I so agree.

Mr. Hufstedler: Very well. We will then stipulate, with the court's permission, that in discussing this Capper-Volstead matter, we are discussing the entire period involved in the original and supplemental complaint.

Mr. Henderson: So stipulated.

The Court: Very well.

* * * * * *

[fol. 1307]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

No. 333-58 HW

CASE-SWAYNE CO., INC., Plaintiff,

vs.

SUNKIST GROWERS, INC., Defendant.

PRETRIAL ORDER NO. ONE—Lodged April 15, 1964 and Filed April 22, 1964

On Monday, March 2, 1964, there came on regularly to be heard before the Honorable Harry C. Westover, United States District Judge, in Courtroom No. 5 in the United States Post Office and Courthouse, Los Angeles, California, a preliminary Pretrial Conference and the following motions and other matters:

1. Motion by plaintiff for order requiring production of documents pursuant to Rule 34 Federal Rules of Civil Procedure.
2. Defendant's Objection to Interrogatories.
3. Motion of defendant to set the Capper-Volstead issue for argument, to sever the Supplemental Complaint for trial, and to authorize a responsive plead- [fol. 1308] ing and certain motions to the Supplemental Complaint, and to set the time therefor.

In connection with the foregoing items, the Court had before it various affidavits, memoranda of points and authorities, and statements of reasons.

[File endorsement omitted]

In addition, the Court had before it the joint Stipulation of Relevant Facts and Material Issues of Law Relative to Issue Raised by Capper-Volstead Defense, together with the briefs filed by the parties on said issue. The parties stipulated in open court, through their respective counsel, that the facts relating to the Capper-Volstead defense for the period covered by the Supplemental Complaint were in all material respects the same as the facts stated in the above stipulation, with the exception of the fact that in 1958 Sunkist, Exchange Orange and Exchange Lemon were all merged into one organization, Sunkist Growers, Inc., and for that reason the ruling of the Court upon the Capper-Volstead defense should apply to the entire period covered in the original and supplemental complaints. The Court approved said stipulation.

The Court heard oral argument upon the issues relating to the Capper-Volstead defense.

After reviewing all of the above documents and hearing oral arguments in open court, and good cause therefor appearing, the Court now makes the following orders, to constitute Pretrial Order No. One in the within cause:

1. The Court determines and rules that at all periods of time covered by the original and supplemental complaints on file herein, Sunkist Growers, Inc., Exchange Orange and Exchange Lemon have complied with, and have constituted one duly qualified agricultural cooperative under Section 1 of the Capper-Volstead Act, 7 U.S.C.A. Section 291.

2. The Court determines and rules that during the period covered by the original and supplemental complaints, an [fol. 1309] illegal conspiracy in violation of the Sherman Act could not exist solely between Sunkist Growers, Inc., Exchange Orange and Exchange Lemon, nor between any two of them, or between Sunkist Growers, Inc., and any other part of the Sunkist system (including District Exchanges, Associations and growers affiliated therewith).

3. All motions before the Court are denied without prejudice to their renewal at a later date.

4. All objections to interrogatories and objections to the motion to produce documents are sustained without prejudice to resubmitting the interrogatories and motions at a later date.

5. By April 1, 1964, the plaintiff is to file with the Court and serve upon the defendant a statement of its theory of the liability in this case, in accordance with its declaration in open court that this action is based on claimed monopolization. The plaintiff may, if it so chooses, incorporate by appropriate reference documents or parts thereof which it has previously filed in this case. The Court contemplates that after said statement is filed, it will request the plaintiff to file a statement of the evidence which supports said theory of liability. Thereafter, if necessary, the defendant will be ordered to file a statement of its theory of nonliability.

6. Both parties are ordered to serve and file their opening statements to the jury by June 1, 1964, which statements shall not take more than thirty minutes to state to the jury. The Court will permit counsel to depart from the phraseology contained in said statements, but not from the general subject matter thereof.

7. The Court orders each party to file its proposed jury instructions, accompanied by citations of authority for each instruction, by June 1, 1964.

8. The Court orders that all documents necessary to bring this case to trial be filed with the Court by a date to be later fixed by the Court. Each party shall prepare [fol. 1310] and file an index of all documents submitted by it.

9. The Court directs the defendant to prepare the pretrial order in this case. After it has been submitted to counsel for the plaintiff, the plaintiff may file objections with the Court, and if the Court deems that a hearing is necessary, the hearing will be set and the Court will determine the pretrial order.

10. The Court sets the within cause for trial at 10:00 a.m. on Monday, November 9, 1964, in Courtroom No. 5 in the United States Post Office and Courthouse, in the City of Los Angeles, County of Los Angeles, State of California.

11. The Court orders that at the trial of this cause the issue of liability shall be tried first and separately from the issue of damages and thereafter, if the jury finds for the plaintiff on the issue of liability, the trial of the issue of damages shall take place. Said trial shall be before the same jury that tried the issue of liability, unless the parties stipulate that it may be before a different jury.

Dated: April 21st, 1964.

Harry C. Westover, United States District Judge.

Approved as to form and content:

W. Glenn Harmon, William H. Henderson, By. William H. Henderson, Attorneys for Plaintiff.

[fol. 1359]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

No. 333-58 H W

CASE-SWAYNE CO., INC., Plaintiff,

vs.

SUNKIST GROWERS, INC., Defendant.

PRETRIAL ORDER No. Two—Lodged May 26, 1964 and Filed May 27, 1964

On Monday, May 18, 1964, at 2:00 o'clock p.m. in Courtroom No. 5 in the United States Post Office and Courthouse,

[File endorsement omitted]

Los Angeles, California, counsel for the parties in the above-entitled action met with the Honorable Harry C. Westover, United States District Judge, to discuss the issues to be submitted to the jury in said case. After discussion with counsel, and good cause therefor appearing, the Court now makes the following orders to constitute Pretrial Order No. Two in the within cause:

1. The issues in this case are limited to the following questions:

(a) Did Sunkist have a monopoly of product oranges grown in the California-Arizona area?

(b) Did Sunkist illegally use any such monopoly power [fol. 1360] which it may have possessed?

(c) Did Sunkist attempt to monopolize product oranges grown in the California-Arizona area?

(d) What damages, if any, did the plaintiff suffer by reason of any violations of law proved under issues (a) and (b), or (c) above?

2. The defendant is ordered to serve and file a statement of its theory of the case by June 8, 1964.

3. Paragraphs 6 and 7 of Pretrial Order No. 1 previously signed in this case are hereby modified as follows: the plaintiff shall serve and file its opening statement to the jury by June 29, 1964. The defendant shall serve and file its opening statement to the jury by July 6, 1964. Both parties shall serve and file their proposed jury instructions, accompanied by citations of authority with each instruction, on or before July 20, 1964.

4. Trial on the issue of damages will commence, if necessary, immediately upon the conclusion of the trial of the issue of liability.

5. Pursuant to the stipulation entered into in open court, the defendant will notify plaintiff on or before May 25, 1964, which of the interrogatories propounded by defen-

dant by document dated May 4, 1964, will be withdrawn. Plaintiff's time to answer, object or otherwise move with respect to said interrogatories shall date from service of such designation of interrogatories withdrawn.

6. Counsel for both parties are directed to proceed with efforts to stipulate to as many facts as are possible. In this connection, the defendant has agreed to stipulate to the percentage of oranges marketed by Sunkist in each market year as disclosed by the records of the U.S. Department of Agriculture.

Dated: May 27th, 1964.

Harry C. Westover, United States District Judge.

[fol. 1790]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

No. 333-58 WB

CASE-SWAYNE CO., INC., Plaintiff,

v.

SUNKIST GROWERS, INC., Defendant.

STIPULATION OF RELEVANT FACTS AND MATERIAL ISSUES OF LAW RELATIVE TO ISSUE RAISED BY CAPPER-VOLSTEAD DEFENSE—Lodged October 23, 1964 and Filed October 27, 1964

By its answer to the complaint, defendant has asserted that it—and former defendants Exchange Lemon Products

[File endorsement omitted]

Company and The Exchange Orange Products Company during their corporate existences—is, and they were, duly qualified under Section 1 of the Capper-Volstead Act and [fol. 1791] entitled to the protection thereof. Based upon said claimed factual qualification, defendant has asserted a claimed defense to the charges or certain of the charges alleged in the complaint. Because the said issue of qualification under Section 1 of the Capper-Volstead Act, whether sustained or defeated, will materially affect the trial presentation by both plaintiff and defendant, it is the desire of the parties to obtain a determination by the Court of said issue on appropriate motion and ruling prior to trial.

To that end, the parties hereto have entered into this stipulation of the facts deemed by each to support its legal theory. In order to frame the legal issue as the same has been defined by counsel it was necessary to adopt, solely for purposes of this stipulation, certain estimates, approximations and generalizations as to which detailed information was not readily available or easily calculated. Accordingly, the facts herein stipulated to shall be deemed admitted and agreed upon for purposes of the determination of said issue in this action, but shall not be deemed admissions or statements of fact by the parties or either of them for any other purpose or purposes.

Pursuant to the foregoing qualifications and for the purpose stated, the parties hereto, by and through their respective counsel, hereby stipulate that the following may be taken as and deemed to be admitted and true:

Stipulations of Fact

1. *Definition of Terms.* As used in this stipulation, the following terms shall have the meaning indicated in this paragraph:

(a) "Sunkist"—Sunkist Growers, Inc.

(b) "Exchange Orange"—The Exchange Orange Products Company.

(c) "Exchange Lemon"—Exchange Lemon Products [fol. 1792] Company.

(d) "1955 Agreement"—refers to the 1955 Sunkist-District Exchange Association Agreement, a copy of which is attached hereto as Exhibit "A".

(e) "District Exchange"—refers to the intermediate cooperative marketing agencies which are signatories to the 1955 Agreement.

(f) "Association"—refers to citrus packing houses which are signatories to the 1955 Agreement, which in turn are classified into three major groups:

(1) Cooperative Associations

(2) Corporate Growers

(3) Agency Associations.

(g) "Sunkist System"—refers collectively to the Associations and the growers shipping citrus fruit through them, the District Exchanges, Sunkist, Exchange Orange and Exchange Lemon.

2. *Cooperative Associations.* The Cooperative Associations constitute 80.12% by number, and 82.34% by volume of fruit handled of all Associations in the Sunkist System. Such Associations are composed of growers who have joined together to market their fruit cooperatively, and for that purpose have acquired packing house facilities. All of the members of such Associations are fruit growers. Each such grower markets through the Association only the fruit which he produces. None of such Associations deals in the products of non-members in an amount greater in value than such as are handled by it for its members. In the aggregate, the non-member business of such Associations does not exceed ten percent (10%) of the value of all products marketed for members. None of said Cooperative Associations has ever paid dividends on its stock or

membership capital in excess of 8% per annum. Some [fol. 1793] members of such Cooperative Associations are private corporations, which grow fruit, and which do not qualify as, nor do they claim to be, cooperative associations under Section 1 of the Capper-Volstead Act.

3. *Corporate Growers.* Associations which are Corporate Growers constitute 4.97% by number, and 4.72% by volume of all Associations in the Sunkist System. Such Associations are corporations which themselves grow citrus and whose total volume is sufficient to justify the installation of packing house facilities. Such Corporate Growers do not qualify as, nor are they claimed to be, cooperative associations under Section 1 of the Capper-Volstead Act. Such corporations market for their own account only the fruit which they produce and do not deal in the products of others in an amount greater in value than the quantity of products handled for themselves. All products handled for others by such Corporate Growers are handled on an agency basis comparable to that of the Agency Associations.

4. *Agency Associations.* Agency Associations constitute 14.91% by number, and 12.94% by volume, of all Associations in the Sunkist System. The Agency Association is normally a private corporation which owns and operates packing house facilities. Some "Agency Associations" are individually owned enterprises and partnerships. Its stockholders may or may not be growers who ship fruit through the packing house owned by the corporation. That is, some have been fruit growers, and some have not been fruit growers. Where such is the case, the fruit of such stockholders is handled on a uniform basis with fruit of non-stockholders. Such Agency Associations do not qualify as, nor do they claim to be, cooperative associations under Section 1 of the Capper-Volstead Act. The packing house facilities of the Agency Association are made available to producers on the basis of the fruit being packed for market

at cost plus a fixed fee. The Agency Association does not itself participate in either the gain or loss involved in [fol. 1794] marketing fruit through Sunkist beyond the recovery of its costs and fixed fee for packing. Such Agency Association furnishes its facilities and services on an independent contract basis, wholly unrelated to the net returns from the sale of the product handled. A contract between such an Agency Association and its growers which may be deemed as typical of such Associations is attached hereto as Exhibit "B".

5. *District Exchanges.* The District Exchanges are all membership corporations whose membership consists of Associations from one or more of the three categories, to wit: Cooperative Association, Corporate Growers, and Agency Associations. None of the District Exchanges has ever paid dividends on its stock or membership capital in excess of 8% per annum. The District Exchange is not directly involved in the processing or marketing of fruit diverted to products utilization.

6. *Sunkist.* Sunkist is a membership corporation whose members prior to October 31, 1958, were individuals appointed by and representing each of the District Exchanges, on the basis of one member for each District Exchange. Such individual members have normally been growers, but some have not been. The amount of fruit marketed by such individuals through their local Associations, and thus through the Sunkist System, does not exceed 10% of the total fruit marketed by Sunkist. A copy of the Articles of Incorporation and By-laws of Sunkist which were effective during the period covered by this stipulation is attached hereto as Exhibit "C". A copy of a typical membership certificate issued during said period is attached as Exhibit "D". Sunkist has never paid dividends on stock or membership capital in excess of 8% per annum.

7. *Exchange Orange.* Exchange Orange was organized as a capital stock corporation under the general laws of

California. A copy of its Articles of Incorporation and its [fol. 1795] By-laws are attached as Exhibit "E". Exchange Orange was during the period covered by this stipulation a wholly owned subsidiary of Sunkist, engaged in the processing and marketing of products oranges and grapefruit and the products produced therefrom. Exchange Orange has never paid dividends on its stock or membership capital in excess of 8% per annum. Exchange Orange and Exchange Lemon were engaged in producing a full line of citrus products. A description of the orange and grapefruit products is set out in the exhibit attached to Sunkist's answer to Interrogatory No. 2. (Identified in the pleadings as S-2-A-1 to S-2-A-25, and by this reference incorporated herein.) These products include juice products, such as single strength and concentrated juices, and peel products, including citrus oil, pectin, pharmaceuticals, cow feed, etc. All products so produced by Exchange Orange and Exchange Lemon were primarily citrus products, i.e., no products were produced in which a citrus derivative was a mere incidental ingredient.

8. *Exchange Lemon.* Exchange Lemon is a membership corporation whose members are the Associations who handle lemons; it is engaged in processing and marketing products lemons and the products produced therefrom. Exchange Lemon has never paid dividends on its stock or membership capital in excess of 8% per annum. The member Associations of Exchange Lemon include Cooperative Associations, Corporate Growers, and Agency Associations, as said associations are defined and described hereinabove.

9. *Sunkist System—History and Functional Development.* For purposes of describing the organization and functional development of the Sunkist System, the following brief history is set forth:

The California citrus industry dates its first major commercial development to the completion of the Southern

Pacific line to Southern California in 1876. By 1885, Santa [fol. 1796] Fe had added its trackage and the Eastern markets were open.

The earliest shipments of oranges to the East in the 1870's were made by growers on an individual basis. Later, groups of neighboring growers joined together cooperatively to pool their fruit for purposes of sale. These informal groups had by 1892 begun to form into cooperative corporations.

In order to effectively market fresh citrus fruit in the major Eastern markets, it was necessary to have facilities where the fruit could be sorted, graded, washed, packed and shipped by rail. The earliest packing houses were commercial ventures. In their formative stages, the cooperative associations arranged to have their fruit packed by such packers under contract. The first cooperatively owned packing house facilities were acquired in the early 1890's. The concept of cooperative ownership of packing house facilities by the growers shipping through such facilities spread rapidly throughout the California citrus industry in the 1890's.

Early sales of oranges by pioneer growers in the 1880's had been to fruit buyers on an "on tree" basis. The local buyers soon sought to have the grower share the risks of the return on his fruit. Those risks were enhanced by the lack of understanding by buyers of the flow of fruit to the Eastern market—with the resulting glut of some markets and shortage in others.

The sales in the East, meantime, were being made by commission merchants interested primarily in volume and their consequent commissions, not in returns to the growers. After the disastrous marketing season of 1884-85, growers in the infant industry joined to form The Orange Growers Protective Union of Southern California, which for several years in the late 1880's succeeded in placing representatives in the Eastern markets thereby achieving more intelligent distribution of the crop and avoidance of glut. Despite

this early beginning at cooperative marketing, the Union [fol. 1797] succumbed to the persistent opposition of commission men and buyers who were able to make larger profits dealing with growers individually.

After the failure of this and other early attempts at organizing grower marketing, there occurred a series of meetings in 1893 at which the cooperative technique of pooling fruit at the packing house level was explained. Out of these discussions came a plan for creation of informal Boards of Exchange in each producing district. These Boards were to be composed of representatives of each local association within the district. Uniform grades and brands were to be developed by each Board of Exchange for its district. The managers of each association in the district were to meet daily at the office of the district to transact the business of selling their growers' fruit.

The district Boards of Exchange in turn selected representatives on the Executive Board of the Southern California Fruit Exchanges. The Executive Board then had the duty of regulating and prorating sales from the several districts.

The concept of cooperative marketing through grower owned associations was enthusiastically adopted in 1893 and 1894. The informal district Boards of Exchange were incorporated as cooperative corporations by their member associations and were thereafter known as "District Exchanges".

In 1895 the Executive Board was incorporated as Southern California Fruit Exchange. In recognition of the development of cooperative marketing in Central California, as evidenced by formation in 1901 of the Tulare County Citrus Fruit Exchange, Southern California Fruit Exchange was dissolved in 1905 and its functions were succeeded to by the newly-formed California Fruit Growers Exchange, which changed its name in 1952 to Sunkist Growers, Inc.

At the outset, Sunkist was entirely a sales department. That remains its primary function. But as an adjunct to

[fol. 1798] its selling function, Sunkist developed many departmental activities of common value to its growers.

During the first two decades of the century, most of the departmental organization of Sunkist had its beginning. An early committee on claims preceded the development of a claims department of Sunkist in 1904. By 1910 this had developed into a Traffic Department, handling traffic claims and related problems for all Associations and District Exchanges affiliated with the Sunkist System.

Work in the field was of great importance. This included encouraging the institution of radical changes in the methods of handling fruit to implement the results of the decay investigation conducted by the U. S. Department of Agriculture in 1904. Research of all types was soon undertaken by Sunkist.

A field organization department was set up to help improve methods of organizing and operating District Exchanges and Associations.

Commencing in 1907, Sunkist developed an advertising program to promote sales of its growers' fruit. The "SUNKIST" trademark was adopted in that same year and has been used continuously since then by Sunkist on the highest quality citrus fruit. In the wake of advertising, came the patent and trademark division.

Among other vital departments to develop in Sunkist was the Research Department, covering all forms of research from methods of handling and preserving fresh fruit to development of citrus products.

By 1915 there existed a substantial surplus production of lemons over and above the quantity which could be sold in the form of fresh fruit. Rather than destroy this surplus fruit, some of the packing houses shipping lemons through the Sunkist System joined together to organize Exchange By-products Company—which later changed its name to Exchange Lemon Products Company. This cor- [fol. 1799] poration was a cooperative endeavor by those associations which formed it. In later years all packing

houses shipping lemons through the Sunkist System joined Exchange Lemon.

In 1918 some of the packing houses shipping oranges through the Sunkist System formed a similar corporation (named Exchange Orange Products Company) for purposes of handling surplus oranges. After an early disastrous experience in the marmalade business during the runaway sugar prices in World War I, that corporation was dissolved. A new corporation of a similar purpose and ownership was formed in 1920 under the name The Exchange Orange Products Company. In 1931, all of its stock was acquired in the name of Sunkist to assure the availability of its processing facilities to all Associations shipping oranges through the Sunkist System, as well as those Associations which had theretofore owned stock.

Thus, by 1920 the corporate and functional pattern of the Sunkist System was established as it remained until October 31, 1958, when Exchange Lemon Products Company and The Exchange Orange Products Company were merged into Sunkist and thereby became the Lemon Products Division and the Orange Products Division, respectively.

With regard to the physical handling of fruit, the grower cares for the trees and brings the citrus fruit to the point where it is ready to be picked. The packing house association then normally sends its specialized crews into the groves to pick the fruit. When the fruit is brought to the packing house, it is washed and graded. The fruit graded as products fruit is then diverted to a separate, so-called, juice fruit bin. The remaining marketable fruit is then either packed or put up as loose fruit awaiting sale on the fresh fruit market. When a sale in fresh fruit channels has been arranged, the fruit is shipped to the customer on a delivered price basis, or placed aboard the train or truck [fol. 1800] in the case of F.O.B. sales, or shipped to the selected auction or public sale markets. A limited amount of fresh fruit is also sold in the producing area on a negotiated sale basis in which case it is picked up at the packing house by the Buyer's trucker.

When the decision was made for any reason to divert fruit to products utilization (as distinguished from sale in fresh fruit channels) the Exchange Lemon or Exchange Orange was notified* and their trucks picked up the fruit for transportation to the appropriate processing plant. In those instances where the Exchange Orange or Exchange Lemon sold a portion of the fruit diverted to it to processors not affiliated with the Sunkist System, that fruit was normally picked up by the processor direct at the packing house on authorization from the Products Company involved.

Neither the District Exchanges nor Sunkist had facilities for physically handling the fruit.** The actual handling of the fruit throughout the marketing operation is by the packing house Association, in the facilities of the appropriate Products Company, or in the hands of public carriers and the operators of public auctions.

Each District Exchange is organized and operated to meet the peculiar local needs of its member packing house Associations. In the job of marketing the fruit of its member Associations, the District Exchange generally is in communication, through representatives furnished by Sunkist, with customers in the major markets throughout the United States. District Exchange personnel possess specialized sales knowledge applicable to the fruit produced in the area served by the particular District Exchange. [fol. 1801] They negotiate and confirm sales for their member packing houses and arrange for the physical shipment of fruit to market, The District Exchange is not directly involved in the processing or marketing of fruit diverted to products utilization.

Apart from its specialized marketing function, the District Exchange is one of the conduits of communication and

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* With the exception of Arizona grapefruit and Yuma oranges, which are handled locally.

** With the possible exception of the Tempe, Arizona, plant which may have been operated by the Arizona Citrus Exchange since November 1, 1957.

representation between the local packing house Association and Sunkist. From an accounting standpoint, the District Exchange acts as a conduit through which payment of proceeds from the sale of fresh fruit and products oranges and grapefruit is made to its affiliated local Associations and assessments on fresh fruit for operating funds and revolving fund capital are collected.

From an accounting standpoint, all members of the Sunkist System beyond the grower (with the exception of the Agency Associations as hereafter noted) operate on a strict cost basis, remitting to the grower, through the channels of the System, all marketing proceeds in excess of reimbursement of actual costs, and deductions or assessments for maintenance of authorized reserves or grower capital. The Agency Associations return to their growers all of the proceeds of marketing over their actual cost plus the fixed fee per box.

The District Exchanges, Sunkist, Exchange Orange and Exchange Lemon market or process and market no citrus fruit other than that coming into the Sunkist System through the Associations.

All products produced by Exchange Orange or Exchange Lemon were marketed by Sunkist in its name.

[fol. 1802]

Issues of Law

I. Was Sunkist qualified under Section 1 of the Capper-Volstead Act? (In determining this issue, what weight, if any, should be given to the administrative determinations of the Treasury Department and the Berkeley Bank for Cooperatives, reviewed in the points and authorities to be filed herein.)

II. Was Exchange Orange qualified under Section 1 of the Capper-Volstead Act?

III. Was Exchange Lemon qualified under Section 1 of the Capper-Volstead Act?

IV. Assuming Capper-Volstead qualifications, can there be an illegal conspiracy in violation of the Sherman Act, solely as among Sunkist, Exchange Orange, and Exchange Lemon, or any two of them?

V. Did the manufacturing activities of Exchange Orange and Exchange Lemon exceed the authorized activity of "collectively processing, preparing for market, handling, and marketing" the by-product citrus fruit of the growers affiliated with the Sunkist System.

Related Issues of Fact and Law

Nothing in the foregoing stipulation of fact and statement of issues of law shall be deemed to limit proof or otherwise remove from this action other issues pertaining to Capper-Volstead, such as the following:

(a) *Conspiracy With Non-qualified Persons.* The complaint claims a conspiracy with certain corporations which are not claimed by defendants to be qualified under Section 1 of the Capper-Volstead Act. [fol. 1803] Plaintiff also asserted that defendant Sunkist, Exchange Orange and Exchange Lemon are not so qualified. It is recognized by the parties that qualification under Section 1 of the Capper-Volstead Act does not afford any protection against liability for a conspiracy with non-qualified persons or corporations in violation of the Sherman Act. Accordingly, the factual issue relative to the existence of such a claimed conspiracy with non-qualified persons remains to be tried.

(b) *Extent of Capper-Volstead Exemption.* The parties recognize that qualification under Section 1 of the Capper-Volstead Act does not afford any protection against liability for monopoly or attempt to monopolize where such monopoly or attempt to monopolize is accompanied by predatory practices. The parties disagree, as a matter of fact and law, as to whether

any "predatory practices" have taken place. Accordingly, the legal and factual issue relative to the existence of such predatory practices remains to be tried.

The parties disagree regarding the effect of qualification under Section 1 of the Capper-Volstead Act, where there is no conspiracy with non-qualified persons or organizations, and where there are no predatory practices. The plaintiff contends that under these circumstances, the defendant may still be liable for violation of Section 2 of the Sherman Act; the defendant contends that qualification under these circumstances grants immunity. This issue of law remains to be determined.

(c) *Undue Enhancement of Price.* The complaint charges and the answer denies undue enhancement of prices of by-product citrus fruit, substantially in the [fol. 1804] terms of Section 2 of the Capper-Volstead Act. The legal effect of this issue remains to be determined, and the factual issue as to whether or not an undue enhancement occurred remains to be tried.

On the Basis of the Foregoing stipulation of facts and issues of law, the parties respectfully ask leave of the Court to file concurrent briefs of the controlling law and facts on or before May 24, 1961, and concurrent reply briefs on or before June 26, 1961; whereupon the parties pray that the Court set the matter for argument and determine the issues herein set forth prior to trial.

Dated: April 10, 1961.

By William H. Henderson, Attorney for Plaintiff.

February 1, 1961.

By Donald D. Stark, Attorney for Defendant.

It Is So Ordered.

Dated: February ....., 1961.

.....

Judge

[fol. 1805]

EXHIBIT A TO STIPULATION

Executed Copy for
Sunkist Growers, Inc.

1955

SUNKIST

DISTRICT EXCHANGE

ASSOCIATION

AGREEMENT

This copy executed by:
SUNKIST GROWERS, INC.

.....
(District Exchange)

.....
(Association)

Effective date: ....., 19....

[fol. 1806]

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[fol. 1807]

1955

SUNKIST-DISTRICT EXCHANGE-ASSOCIATION AGREEMENT

THIS AGREEMENT, made on the date subscribed hereto, between SUNKIST GROWERS, INC., a California non-profit cooperative marketing association (herein called "Sunkist"), certain non-profit cooperative marketing associations affiliated with Sunkist which execute this agreement (herein collectively called "District Exchanges" and individually called "District Exchange"), and certain nonprofit cooperative associations and others affiliated with Sunkist through District Exchanges which execute this agreement (herein collectively called "Associations" and individually called "Association"),

WITNESSETH:

WHEREAS, it has been deemed desirable by the parties hereto to cooperate in the matter of developing the citrus industry and marketing its fruits and products and to associate themselves together for any and all of the purposes permitted by law for nonprofit cooperative marketing associations;

THEREFORE, in consideration of the foregoing and of the mutual covenants and agreements herein contained, and for other valuable consideration,

THE PARTIES HERETO AGREE AS FOLLOWS:

1. Short Title

This agreement may be referred to as "1955 Sunkist-District Exchange-Association Agreement."

2. Description of Parties

SUNKIST GROWERS, INC. is a nonprofit marketing association organized and existing under the laws of the State of California. It is herein called "SUNKIST".

DISTRICT EXCHANGES are nonprofit cooperative marketing associations, parties to this agreement, marketing the fruit of their affiliated associations through the facilities provided by Sunkist. They are herein collectively called "DISTRICT EXCHANGES" and individually "DISTRICT EXCHANGE".

ASSOCIATIONS are certain nonprofit cooperative associations, corporations, partnerships and individuals, parties to this agreement, each of which is affiliated with one of the District Exchanges and through it with Sunkist, which harvest and/or receive and prepare for market their own fruit or the fruit of their growers and deliver the same for marketing under this agreement. They are herein collectively called "ASSOCIATIONS" and individually "ASSOCIATION".

[fol. 1808] 3. Definitions of Terms

As used in this agreement the following terms have the following meanings:

FRUIT means the citrus fruit of every size, grade and quality, including culls, under the control of the parties to this agreement.

Box means an amount of the particular fruit involved which is contained in the standard packed box in common use as determined from time to time by the board of directors of Sunkist.

TO MARKET OR MARKETING means sale or shipment for purposes of sale as fresh fruit, utilization for products, or other disposition.

CONTROL OF FRUIT. Fruit shall be deemed to be under the control of an Association when covered by an agreement or harvested for and/or received by the Association.

GROWER is an individual, a partnership, a corporation, or any other entity whose fruit is handled as provided in the paragraph defining control of fruit.

4. Purpose of Agreement

This agreement is entered into for the purpose of carrying out the aims and purposes of Associations and their members and of District Exchanges in connection with the marketing of their fruit, and to continue the cooperative marketing system generally referred to as Sunkist Growers, Inc. To effect said purposes, the parties hereto desire to maintain instrumentalities to act for said parties in maintaining, extending and making more efficient the marketing of said fruit.

All parties to this agreement recognize that the strength of the organization and its effectiveness are largely dependent upon complete conformance to the provisions and principles of the contract by all parties. This is in effect a mutual agreement on the part of all to work for the common good of all.

5. Effective Date and Term of Agreement

This agreement shall become effective on September 1, 1955 as to all parties executing the same on or before said date, and shall be effective as to other parties when executed by them as hereinafter provided. It shall continue in effect until terminated as hereinafter provided, but in no event for a longer period of time than is now or may hereafter be permitted by law.

6. Agreement to Market Fruit

Each Association agrees to market hereunder all of the citrus fruit subject to its control through the District Exchange with which it is affiliated.

Each District Exchange agrees to market hereunder through Sunkist all of the citrus fruit subject to its control.

Sunkist agrees to market all of said fruit.

7. Sunkist as Agent

Each District Exchange and Association hereby designates Sunkist as its agent and agent of its growers in all

matters concerning the marketing of fruit and products hereunder and in all matters deemed by Sunkist to be for the general good of the parties hereto. Subject to the terms and conditions of this agreement, full power and authority is hereby conferred upon Sunkist as such agent to conduct said activities in such manner as it in its sole discretion determines is for the best interests collectively of the District Exchanges and Associations, parties hereto.
[fol. 1809] District Exchanges and Associations authorize Sunkist to carry on said activities through such officers, agents and employees and such departments or other facilities as the board of directors of Sunkist may from time to time determine.

8. Power Conferred on Sunkist by Legislative Acts

District Exchanges and Associations agree that Sunkist shall have and in its discretion may exercise on an equitable basis on behalf of District Exchanges and Associations any and all powers relating to the marketing of fruit hereunder that Sunkist, District Exchanges and Associations are or may be hereafter authorized by legislative act or by order or regulations based thereon to exercise. Any Association or District Exchange may as to it at any time and from time to time (by resolution of its board of directors, if a corporation) terminate the authority conferred upon Sunkist by this section or again give such authority to Sunkist. Sunkist shall be notified immediately in writing of any such termination of said authority, and unless so notified Sunkist may exercise any of the powers referred to in this section.

9. Reserved Rights

Each Association reserves to itself the right to determine to what market it shall ship, where its fruit shall be sold, and, except at auction points, the price it is willing to receive.

Each Association hereby delegates said reserved right to the District Exchange with which it is affiliated; provided, however, that any Association may at any time and from time to time (by resolution of its board of directors, if a corporation) terminate such delegation and itself exercise said reserved right for such period of time as to it may seem proper, or redelegate said reserved right to such District Exchange.

10. Rights Conferred on Sunkist

In order properly to supply the market, District Exchanges and Associations authorize Sunkist by a majority vote of its board of directors to determine the maximum amount of fruit to be marketed currently and to allocate the opportunity to ship equitably among Associations; provided, however, that said majority includes directors representing eighty-five percent (85%) by volume of shipments as determined by the board of directors of the species or variety under consideration. Said parties agree not to exceed said allocation.

11. Charges and Expenses

(a) Of Sunkist

All charges and expenses of Sunkist, including deductions for such reasonable reserves as may from time to time be prescribed by the board of directors of Sunkist and including a subscription to "The California Citrograph", shall be met by assessments upon District Exchanges and upon any Association which may be marketing directly through Sunkist pursuant to this agreement. The method, amount, manner and time of assessment shall be fixed and determined from time to time by the board of directors of Sunkist.

Each District Exchange agrees to pay to Sunkist when due the amount of any assessments hereunder and authorizes Sunkist to deduct from the proceeds of sale of fruit

[fol. 1810] marketed for it hereunder the amount of any such assessment and any other amounts due Sunkist from District Exchange or from any Association affiliated with it.

(b) Of District Exchanges

All charges and expenses of District Exchanges, including Sunkist assessments and deductions for such reasonable reserves as may from time to time be prescribed by their respective boards of directors, shall be met by assessments upon Associations. The method, amount, manner and time of assessment shall be fixed and determined from time to time by the board of directors of each District Exchange.

Each Association agrees to pay to the District Exchange with which it is affiliated when due the amount of any assessments hereunder and authorizes Sunkist or District Exchange to deduct from the proceeds of sale of fruit marketed hereunder the amount of any such assessment and any other amounts due District Exchange or Sunkist from Association.

12. Losses

The only losses in connection with the sale of fruit or otherwise under this agreement for which Sunkist shall be responsible to District Exchanges or Associations are losses arising from the financial failure or default of purchasers after having positively accepted the fruit, which default is not due to complaint of the buyer concerning the quality, condition or grade of the fruit. Such losses shall be paid by assessments upon fruit marketed through Sunkist in the method, amount and manner determined by the board of directors of Sunkist.

13. Customers' Claims

In case of any controversies with customers wherein in the judgment of the board of directors of Sunkist the col-

lective interest of Sunkist shippers is involved, the judgment of said board of directors as to settlement of such dispute shall be final and binding upon the Association which furnished the fruit.

14. Pooling of Fruit

(a) Pooling in General

Pools may be established by the board of directors of Sunkist for the handling, marketing or disposal of any one or more species or varieties of fruit, or fruit produced in or destined for any particular geographical section, or fruit conforming or not conforming to specified standards of quality and/or size. Except in the case of those types of pools mentioned in subsection (b) hereof, the inclusion of fruit in such pools shall not be mandatory, but each Association shall have the right to determine whether it shall participate in such pools.

The conditions of eligibility of fruit for such pools, the methods of operating the same and all rules and regulations in connection with such pools shall be prescribed by the board of directors of Sunkist.

In the event such pool or pools shall thus be established, the rights reserved elsewhere in this agreement to Associa- [fol. 1811] tions to determine to what markets they shall ship, where their fruit shall be sold and, except at auction points, the price they are willing to receive shall be exercised solely by Sunkist as to all fruit included in said pool or pools.

(b) Pooling of Fruit Intended for Export or for Use Other Than as Fresh Fruit

Pools may be established as hereinafter provided for the handling, marketing or disposal of fruit intended for export or for Government use or for use other than as fresh fruit.

A pool established under this subsection (b) may include all fruit falling within one of these classifications or may

be limited to such fruit produced in or destined for any particular geographical section. A pool under this subsection (b) must be established by a majority vote of the board of directors of Sunkist; provided, however, that said majority includes directors representing seventy-five percent (75%) by volume of shipments as determined by the board of directors of the species or variety or varieties in the district under consideration.

The conditions of eligibility of fruit for such pools, the methods of operating the same and all rules and regulations in connection with such pools shall be prescribed by the board of directors of Sunkist.

Notwithstanding any other provision of this agreement, the inclusion of fruit in such pool or pools when thus established shall be mandatory and the rights reserved elsewhere in this agreement to Associations to determine to what markets they shall ship, where their fruit shall be sold and, except at auction points, the price they are willing to receive shall be exercised solely by Sunkist as to all fruit included in said pool or pools.

15. Routing of Shipments and Determining Transportation Facility

Sunkist shall have authority to specify the route of all shipments of fruit. Any Association may at any time and from time to time (by resolution of its board of directors, if a corporation) terminate such authority as to it or again give Sunkist such authority. Sunkist shall be notified immediately in writing through the District Exchange with which such Association is affiliated of any such termination of such authority, and unless so notified Sunkist may exercise the same.

Sunkist shall have authority by the vote of three-fourths (¾) of the entire number of its board of directors to determine the transportation facility—whether by rail, by water or otherwise.

16. Pooling of Transportation Expenses

Transportation costs, including but not restricted to costs of refrigeration and other protective services, incurred in connection with the movement of fruit destined for points outside the state of origin and of fruit intended for use other than as fresh fruit destined for points either within or without the state of origin, may in the manner and to the extent determined by a three-fourths (¾) vote of the entire [fol. 1812] number of the board of directors of Sunkist be pooled equitably in relation to the different types of refrigeration and other protective services and paid by charges or assessments levied and apportioned as the board of directors of Sunkist may determine.

17. Methods of Marketing

All fruit must be marketed through the facilities provided by Sunkist. The board of directors of Sunkist shall determine the methods of marketing to be adopted in any or all markets and the types of containers and method of packaging to be used.

18. Establishment and Use of Grades

Sunkist shall have authority to establish grades for fruit and products, and to establish and from time to time change rules and regulations pertaining thereto, and to prescribe the standards of quality of fruit and products to be marketed under such grades, and to permit Associations to market their fruit under such grades upon compliance with such prescribed standards and with all rules and regulations established by Sunkist pursuant hereto.

19. Establishment and Use of Trade-marks, etc.

Sunkist shall have authority to acquire, own and use one or more trade-marks, trade names, brands, patents and copyrights and to prescribe all rules and regulations in connection with the use thereof, which may be changed from time to time in the sole discretion of Sunkist.

20. Contact with Buyers

District Exchanges and Associations shall not solicit business from the trade or employ any solicitor or agent, or correspond or communicate with any buyer for the purpose of promoting the sale of their fruit. District Exchanges and Associations further agree that all prices, quotations and allowances shall be issued and distributed solely by Sunkist. Copies of correspondence with district managers in the markets by any District Exchange must be sent to Sunkist; and by any Association, to Sunkist and to the District Exchange with which it is affiliated.

21. Warranty

Each Association warrants to the District Exchange with which it is affiliated and each District Exchange and Association warrants to Sunkist that it has the right to receive, pack and deliver for marketing and to market through Sunkist all of the fruit which it may deliver under this agreement. Each of said parties further warrants that said fruit and the disposition thereof shall comply with all state and federal statutes and regulations applicable thereto.

22. Indemnity

District Exchange and Association severally agree to indemnify and save harmless Sunkist against all loss, damage, [fol. 1813] injury, liability, cost and/or expense of whatsoever nature suffered or to be suffered by Sunkist by reason of any claim or claims asserted or made to or against Sunkist or any of its agents, customers, vendees or anyone to whom any such fruit or product is delivered, or by whom the same is handled, and/or by reason of Sunkist's agreement to defend or its defense of any action at law or any suit in equity brought or to be brought against Sunkist, or any customer or vendee of Sunkist, or anyone to whom any such fruit or product is delivered, or by the same is

handled, specifically including but not restricted to any and all claims asserted by anyone by reason of District Exchange's or Association's having made use of any patented device or machinery or process in infringement of letters patent, or having produced any patented product or products whatsoever in infringement of letters patent, or having used in connection with such fruit or products any label, trade-mark or copyright in infringement of the rights of others, or constituting unfair competition or growing out of or connected with the receipt, distribution or marketing of such fruit or products by Sunkist.

23. Agreements of Associations With Growers

Each Association agrees that it will at all times maintain in force appropriate agreements between itself and its growers which will provide for the delivery to Association of all of the fruit covered by such agreements. Each Association agrees to furnish, upon request, to Sunkist and/or to District Exchange a list of growers then affiliated with said Association and a copy of its agreement with growers.

Each Association agrees not to release any of its growers from such grower agreement (except upon termination of the same by giving of appropriate notice of termination under the terms of said agreement during the regular withdrawal period) without giving to Sunkist and to the District Exchange with which such Association is affiliated ten days' notice of such proposed release. At any time within the varietal season that such releases individually or collectively shall total more than five (5) percent of the volume of the Association by variety, any further releases must be approved by the District Exchange with which said Association is affiliated.

24. Exchange Lemon Products Company

Associations handling lemons agree to execute the Exchange Lemon Products Company Membership Contract.

25. Direct Marketing by Associations

Where District Exchange affiliation is not available or is impracticable, and when deemed necessary by the board of directors of Sunkist in its sole discretion, Associations may market directly through Sunkist on such terms and conditions as said board of directors shall prescribe.

26. Remedies

Each District Exchange and Association understands and agrees that the execution of this agreement by it and like agreements by other District Exchanges and Associations [fol. 1814] creates for all and makes available to all the cooperative marketing system generally known as Sunkist Growers, Inc.; that the operation of said cooperative marketing system and the equitable distribution among all District Exchanges and Associations of its benefits and its burdens require the strict performance by each District Exchange and Association of this agreement; that by reason of the foregoing and of the preparation made by all parts of said cooperative marketing system to receive, handle and market fruit hereunder, and for other reasons, it is and would be impracticable or extremely difficult to fix the actual damage to Sunkist if the District Exchanges or Associations or any one of them should fail to deliver all of said fruit in accordance with the terms of this agreement.

In view of the foregoing, each District Exchange agrees to pay to Sunkist as liquidated damages for all fruit withheld, delivered, sold, consigned, marketed or otherwise disposed of by or for such District Exchange other than in accordance with the terms hereof, and each Association agrees to pay to Sunkist as liquidated damages for all fruit withheld, delivered, sold, consigned, marketed or otherwise disposed of by or for such Association other than in accordance with the terms hereof, the sum of fifty cents (50c) per box. In the event of any such violation of this agreement, Sunkist shall be entitled to recover liquidated dam-

ages from either District Exchange or Association but not from both as to the same transaction.

All of the parties hereto agree that the successful operation of this agreement requires that each District Exchange and Association observe and conform to all of the provisions hereof. Each of the parties hereto agrees that in the event of a breach or threatened breach by it of any of the provisions hereof regarding delivery of fruit each of the other parties hereto shall be entitled to an injunction to prevent breach or further breach hereof and to a decree of specific performance hereof.

If Sunkist brings and successfully maintains any action whatever by reason of a breach or threatened breach hereof or otherwise against a District Exchange or Association, said District Exchange or Association agrees to pay to Sunkist all costs of court, premiums for bonds, expenses and fees arising out of or caused by the litigation and reasonable attorneys' fees expended or incurred by Sunkist in such proceedings. All such costs and expenses shall be included in any judgment obtained in any such action.

Sunkist is hereby authorized to exercise all of the remedies or any of them particularly provided for or to be provided for by the Agricultural Code or the Civil Code of California as well as any other remedies now or hereafter permitted by law, and said remedies shall be deemed cumulative and not exclusive.

27. Board of Representatives

(a) Powers, Membership and Organization

To aid in carrying out the provisions of this agreement, a board of representatives is hereby created which, when its authority is invoked as herein provided, shall have super- [fol. 1815] vision over all matters pertaining to the carrying out of the provisions of this agreement as advisory to the board of directors of Sunkist; provided, however, that its authority shall not be construed to extend to the determina-

tion of the maximum amount of fruit to be marketed currently or the allocation of the opportunity to ship under Section 10 hereof, or to the establishment or operation of pools under Section 14 hereof, or to any other matters in this agreement which are subject to approval by volume or percentage of fruit handled.

Said board of representatives shall consist of one representative of each District Exchange, such representative to hold office at the pleasure of such appointing District Exchange. Each District Exchange shall appoint one representative on said board of representatives and shall certify such appointment in writing to Sunkist, and such appointment shall take effect when so certified; provided, the organization and powers of said board shall not be affected by the failure of any District Exchange to make or certify its appointment of a representative.

Said board shall have a chairman and a secretary. The president of Sunkist shall be ex officio chairman of said board, but in case of his absence or failure for any reason to perform his duties as such chairman the board shall elect a chairman for the time being. The board shall elect its own secretary who shall keep a record of its proceedings.

(b) Meetings

A meeting of said board of representatives shall be held upon request by two or more members of the board of directors of Sunkist. Such request may be oral if made at any meeting of the board of directors but must be in writing and delivered to the then acting secretary of Sunkist if made at any other time. Upon such request, said secretary shall immediately call said meeting and give notice thereof as hereinafter provided within twenty-four (24) hours after the receipt of said request. Said meeting shall be held not less than seven (7) nor more than fourteen (14) days from the date of the request for said meeting. All meetings of said board of representatives shall be held at the principal office of Sunkist. Written notice of the time and place of

holding said meetings shall be given by depositing in the United States mail, postage fully prepaid, a registered letter containing a copy of such notice addressed to each member of the board of representatives in care of the District Exchange by which he was appointed.

Any action of the board of representatives which shall have the effect of modifying or rescinding action theretofore taken by the board of directors of Sunkist must be taken at a meeting of said board of representatives which was called within ten (10) days after such action of the board of directors. All acts done or performed pursuant to action of the board of directors of Sunkist taken prior to the request for said meeting of the board of representatives shall be valid.

(c) Voting

At all meetings of the board of representatives voting shall be upon a volume basis; that is, each representative shall be entitled to one vote for each box of fruit marketed [fol. 1816] in accordance with this agreement by the District Exchange which he represents during the preceding fiscal year of Sunkist. Votes representing a majority of the total amount of fruit marketed during the preceding fiscal year of Sunkist by all District Exchanges shall be necessary for any action by said board of representatives.

(d) Effect of Action

When said board of representatives has taken action upon any matter pertaining to the carrying out of any provision of this agreement, the secretary of the board of representatives shall forward a copy of the resolution embodying such action to the board of directors of Sunkist, certified to by him; whereupon the board of directors of Sunkist shall take notice of such action as instructions from said board of representatives and shall act accordingly, subject to the provisions of the second paragraph of subsection (b) of this Section 27.

28. Amendment of Agreement

Except as hereinafter provided, any provision of this agreement may be amended upon resolution of a majority of the entire board of directors of Sunkist ratified in writing by two-thirds (⅔) in number of the District Exchanges then parties hereto. Without the affirmative vote of a majority of the entire board of directors of Sunkist ratified in writing by ninety percent (90%) in number of the District Exchanges and by ninety percent (90%) in number of the Associations then parties hereto, no amendment shall be made of Section 9 hereof entitled "Reserved Rights", or of subsection (a) entitled "Pooling in General" of Section 14 hereof entitled "Pooling of Fruit", or of Section 27 hereof entitled "Board of Representatives", or of this Section 28 entitled "Amendment of Agreement". No amendment shall be made of any portion of this agreement which shall operate to deprive any party hereto of the right of annual withdrawal herefrom.

Any amendment made pursuant to this section shall become effective upon the delivery to Sunkist of such written ratification by the requisite number of District Exchanges and Associations, unless a subsequent effective date shall have been fixed by the board of directors in proposing the amendment.

All of the parties hereto shall be bound by any amendment so made whether or not they ratified the same.

29. Termination of Agreement

(a) By Association

Any Association may terminate this agreement as to it on the 31st day of October of any year by giving notice of such termination to the District Exchange with which it is affiliated and to Sunkist, at the time and in the manner provided in subsections (d) and (e) hereof.

(b) By District Exchange

(1) With Association

Any District Exchange may terminate this agreement as between it and any Association on the 31st day of October [fol. 1817] of any year giving written notice of such termination to such Association at the time and in the manner provided in subsections (d) and (e) hereof. District Exchange shall within two (2) days after the giving of any such notice of termination to an Association notify Sunkist by registered mail of the giving of such notice.

In the event of such termination by a District Exchange as to any Association, this agreement shall remain in full force and effect as between such Association and Sunkist. However, either of said remaining parties may terminate this agreement by giving notice of termination in the manner provided in subsection (e) hereof within ten (10) days after receipt by Association of notice of termination by District Exchange or receipt by Sunkist of notification from District Exchange, whichever shall be later. In the event the agreement thus remains in effect between an Association and Sunkist, such Association shall be affiliated with and market its fruit through another District Exchange or in the sole discretion of Sunkist may market its fruit directly through Sunkist as elsewhere in this agreement provided.

(2) With Sunkist

Any District Exchange may terminate this agreement as between it and Sunkist on the 31st day of October of any year by giving notice of such termination to Sunkist at the time and in the manner provided in subsections (d) and (e) hereof.

If a District Exchange shall give notice of termination to Sunkist as herein provided, such notice of termination shall not be deemed to constitute notice of termination by the Associations affiliated with such District Exchange, and unless such Associations shall give notice as provided

in subsection (a) hereof this agreement shall remain in full force and effect as to them, and such Associations shall be affiliated with and market their fruit through another District Exchange or in the sole discretion of Sunkist may market their fruit directly through Sunkist as elsewhere in this agreement provided.

(c) By Sunkist

Sunkist may terminate this agreement on the 31st day of October of any year as to any one or more District Exchanges or Associations by giving written notice of such termination to such District Exchange or Association at the time and in the manner provided in subsections (d) and (e) hereof.

In the event of the breach of this agreement by any District Exchange or Association, Sunkist may at its option terminate this agreement as to such District Exchange or Association at any time by giving such District Exchange or Association written notice of said breach and the election of Sunkist to terminate the agreement. Such termination shall be effective immediately.

If this agreement is terminated by Sunkist as to one or more District Exchanges and/or Associations, notice need be given only to such District Exchange or District Exchanges or Association or Associations and need not be given to other District Exchanges or Associations, except [fol. 1818] that in case of termination by Sunkist as to an Association, notice shall be given to the District Exchange with which such Association is affiliated.

In the event termination is judged to be to the best interests of the other District Exchanges and/or Associations, Sunkist may at any time by a two-thirds (⅔) vote of the entire board of directors terminate this agreement by giving written notice of such termination. Such termination shall be effective immediately.

(d) Time of Giving Notice

All notices of termination, except as otherwise specifically provided, shall be mailed during the last fifteen days of

September prior to October 31 of the year in which the agreement is to be terminated.

(e) Manner of Giving Notice

All notices of termination shall be given by depositing in the United States mail, postage fully prepaid, a registered letter containing a notice of such termination addressed to the party for whom intended.

(f) Time and Effect of Termination

When any such notice of termination is given, this agreement shall be terminated as to the party or parties affected at 11:59 P.M. on October 31 of the year in which said notice is given, except that when notice is given by Sunkist upon breach of the agreement, said termination shall be effective immediately.

The termination of this agreement as to any party or parties shall not affect rights which have accrued hereunder prior to termination. Any such termination shall not affect this agreement as to these remaining parties hereto.

30. Execution of Agreement

It is contemplated that this agreement will be executed in numerous copies identical except as to the names of the executing District Exchanges and Associations and as to date of execution. All such copies taken together shall constitute one agreement among all of the executing parties.

This agreement shall become effective as between Sunkist and any District Exchange when both of such parties execute one or more copies hereof, without regard to execution of the same by any Association or Associations.

This agreement shall become effective as to an Association when it and the District Exchange with which it desires to affiliate execute the agreement and when Sunkist has signified its approval of said Association's becoming a party hereto by likewise executing the same copy or copies of such agreement. An Association shall be deemed

to be affiliated with the District Exchange which executes the same copy or copies of this agreement as are executed by such Association.

A sufficient number of copies of this agreement shall be executed to provide Sunkist with a copy hereof executed by each signing Association as well as by each signing District Exchange.

[fol. 1819] WITNESS the signatures of the parties hereto, the actual date of signing appearing opposite the signature of each party.

Actual date of signing by Sunkist Growers, Inc.:

SUNKIST GROWERS, INC.

....., 19.... By .....
President

.....
Secretary

(seal)

Actual date of signing by District Exchange:

.....
(District Exchange)

....., 19.... By .....
President

.....
Secretary

(seal)

Actual date of signing by Association:

.....
(Association)

....., 19.... By .....
President

.....
Secretary

(seal)

[fol. 1820]

RESOLUTION AUTHORIZING SUNKIST GROWERS, INC. TO EXECUTE AGREEMENT

RESOLVED, that SUNKIST GROWERS, INC., execute the 1955 SUNKIST-DISTRICT EXCHANGE-ASSOCIATION AGREEMENT, and that the president or any vice president and the secretary or any assistant secretary of SUNKIST be and they are hereby authorized to subscribe said Agreement in the name and on behalf of SUNKIST, and to attach its seal thereto, and to deliver executed copies of the same to District Exchanges and Associations, parties thereto.

ATTEST: A true copy of resolution adopted September 7, 1955 by board of directors of SUNKIST GROWERS, INC.

(seal)

.....

Secretary of SUNKIST GROWERS, INC.

RESOLUTION AUTHORIZING DISTRICT EXCHANGE TO EXECUTE AGREEMENT

RESOLVED, that this DISTRICT EXCHANGE execute the 1955 SUNKIST-DISTRICT EXCHANGE-ASSOCIATION AGREEMENT, and that the president or any vice president and the secretary or any assistant secretary of this DISTRICT EXCHANGE be and they are hereby authorized to subscribe said Agreement in the name and on behalf of this DISTRICT EXCHANGE, and to attach its seal thereto, and to deliver executed copies of the same to SUNKIST and to each Association affiliated with this DISTRICT EXCHANGE.

ATTEST: A true copy of resolution adopted .....day, 19.... by board of directors of .....
(District Exchange)

(seal)

.....
Secretary of said DISTRICT EXCHANGE

RESOLUTION AUTHORIZING ASSOCIATION TO EXECUTE AGREEMENT

RESOLVED, that this ASSOCIATION execute the 1955 SUNKIST-DISTRICT EXCHANGE-ASSOCIATION AGREEMENT, and that the president or any vice president and the secretary or any assistant secretary of this ASSOCIATION be and they are hereby authorized to subscribe said Agreement in the name and on behalf of this ASSOCIATION, and to attach its seal thereto, and to deliver executed copies of the same to SUNKIST and to the District Exchange with which this ASSOCIATION is affiliated.

ATTEST: A true copy of resolution adopted .....day, 19.... by board of directors of .....
(Association)

(seal)

.....
Secretary of said ASSOCIATION

[fol. 1821]

EXHIBIT B TO STIPULATION

AGREEMENT

This Agreement made this ..... day of ..... 19...., between .....

.....

hereinafter called the Grower, and the Tempeco Groves Co., hereinafter called the Company, WITNESSETH:

That in consideration of the payments to be made by the Company as hereinafter stated, the Grower does hereby sell and agree to deliver to the Company at its packing house in Tempe, Arizona, in such amounts and at such times as the Company may require, all the marketable citrus fruit produced on ..... acres of land situated

.....

which said grove is now owned, operated or controlled by the Grower.

In consideration of the sale and delivery of the citrus fruit by the Grower as above mentioned, the Company does hereby agree to receive, process, grade, pack, and in an orderly manner, sell said fruit in such markets and at such prices as in its judgment may seem best, and to pay the Grower as hereinafter provided.

It is mutually agreed between the Grower and the Company:

First: That the Company will keep each lot of fruit delivered by the Grower under this Agreement separate from fruit which it may receive from any other source until the same is classed or graded and will keep a complete record of the same, but after so classifying or grading the Company may pool said fruit with like fruit received from other sources; the number of packed boxes of fruit and the amount of bulk fruit to be in any pool, as well as the length of time during which any pool may be in operation will be determined by the Company, as in its judgment

may seem best, and it will keep complete records of all fruit in, its costs of every kind incurred in connection with, and the proceeds from, each pool.

Second: That after the fruit is classified or graded the Company will market the same as herein provided and upon receiving all of the cash proceeds from any pool in which fruit delivered under this Agreement shall be included it will deduct and retain for itself from said proceeds all of its costs of every kind incurred in connection with such pool and on all fruit included therein, plus, not in excess of 5 cents per field box on grapefruit, 10 cents on oranges and lemons and miscellaneous varieties which shall be marketed from such pool and the balance then remaining shall be taken as net proceeds from the marketing of such pool.

Third: That when the net proceeds from each pool in which fruit delivered under this Agreement may be placed shall have been determined as above provided, the Company will render to the Grower a statement showing the net amount due, and will thereupon pay to the Grower the amount of said net proceeds as the full purchase price for the fruit delivered under this Agreement and included in such pool.

[fol. 1822] Fourth: That in the event the Grower shall have an oppprtunity to sell in bulk at the grove any part of the fruit sold and agreed to be delivered to the Company under this Agreement at a price higher than that which, in the judgment of the Company, will be received on the then operating pool or pools in which such bulk fruit would be included, the Grower, on application to the Company, may receive the Company's permission to sell in bulk at the grove such an amount of said fruit as may then be mutually agreed upon between the parties hereto and the Company will thereupon release from the operation of this Agreement the amount of fruit so agreed upon but the Grower shall pay to the Company $2.50 on each ton of the fruit so released.

Fifth: That this Agreement may be cancelled by written notice from the Grower during August of any year in which this Agreement is in force, or at any time by mutual consent of both parties hereto, but unless so cancelled shall be in full force and effect for 5 shipping seasons, ending July 31, 19.....

Sixth: The Company shall not be liable for any damage to fruit delivered under this Agreement that shall be due to any Act of God, or public enemy, or to strikes, or to any accident in shipment or storage.

This Agreement shall be binding upon the heirs, executors, administrators, and assigns of the Grower and upon the successors and assigns of the Company.

IN WITNESS WHEREOF the Grower and the Company have extended this Agreement in duplicate the day and year first above written.

....

Mail Address Grower

.....

Phone Number TEMPECO GROVES CO.

Age of grove ..... By .....

..... acres Marsh Seedless Grapefruit

..... acres Navel Oranges ..... acres Lemons

..... acres Seedling Oranges ..... acres Tangerines

..... acres Valencia Oranges

[fol. 1823]

EXHIBIT C TO STIPULATION

ARTICLES OF INCORPORATION
OF
SUNKIST GROWERS, INC.

KNOW ALL MEN BY THESE PRESENTS:

That we, the undersigned, a majority of whom are citizens and residents of the State of California, and each of whom is a person engaged in the production or marketing of citrus fruits, have, pursuant to Sections 362 and 653r of the Civil Code of California providing for the amendment of articles of incorporation, voluntarily associated ourselves together for the purpose of forming a nonprofit cooperative horticultural association under the laws of the State of California, and for such purpose

WE HEREBY CERTIFY:

FIRST. That the name of said association is and shall be:

SUNKIST GROWERS, INC.

SECOND. That the purpose for which it is formed is:

To furnish the facilities and agencies through which the citrus fruits and their by-products of its members and growers represented by them may be marketed throughout the United States and other countries under such conditions as may be determined upon by contract between this Exchange and its members and organizations of growers which they represent;

To lessen the cost of marketing by creating agencies which will act for all members;

To insure the collection of sales; to facilitate the collection of damage claims; to encourage the improvement of the product and the package;

To improve the methods of fruit handling in the groves and in the packing houses; to improve the equipment and facilities for fruit handling; to standardize the grades and the pack, particularly of the advertised brands of the Exchange, and to increase the Exchange membership; to standardize the business methods of its cooperating organizations;

To increase the consumption of citrus fruits and their by-products by bringing about an equitable distribution thereof at all times to all markets and by developing new markets;

To organize and maintain a traffic department for the handling of traffic matters including claims; to maintain a legal department; to maintain an advertising department for the purpose of increasing the consumption of citrus fruits and their by-products; to institute and conduct any other department to assist in carrying out its purposes; [fol. 1824] to further and to safeguard the general interests of the citrus industry;

To purchase or otherwise acquire, own, hold, lease, mortgage and sell such real and personal property as may be necessary, desirable or convenient for the legitimate carrying on of any of its purposes; to purchase or otherwise acquire, to own, hold, sell, transfer or pledge shares of the capital stock of any corporation or association which may be necessary, convenient or desirable in furtherance of the legitimate purposes of the Exchange as contained herein, and while the owner thereof to exercise all the rights of ownership including the right to vote said shares of stock;

To apply for, take out, acquire, own, use and dispose of trademarks, copyrights and patents necessary, convenient or desirable for furthering any of the purposes for which this Exchange is formed, and to make rules and regulations with reference to the use thereof and from

time to time to change, modify or repeal such rules and regulations;

To borrow money of any person, firm or corporation, and to secure the payment thereof by note, mortgage, bond or deed of trust or other evidence of indebtedness or by any other lawful means, and to take and receive notes, bonds, mortgages, deeds of trust or any evidence of indebtedness for the use and benefit of said corporation;

The Exchange is instituted for the purposes of mutual help in the accomplishment of each of the purposes above set forth. It shall not have a capital stock and it shall not be conducted for profit.

THIRD. That the place where the principal business of said Exchange will be transacted is the City of Los Angeles, County of Los Angeles, State of California.

FOURTH. That said Exchange shall have perpetual existence.

FIFTH. That the number of directors of said corporation shall be twenty-six (26), and that the names and residences of the directors who are appointed for the first year, are:

Name	*Residence*
1. F. Q. Story	Alhambra, California
2. W. E. Sprott	Porterville, California
3. A. P. Harwood	Upland, California
4. H. E. Cheseboro	Covina, California
5. W. R. Powell	Glendora, California
6. P. J. Dreher	Pomona, California
7. S. J. Beals	Orange, California
8. W. G. Fraser	Riverside, California
9. A. P. Johnson	Riverside, California
10. Frank Scoville	Corona, California
11. E. F. Van Luven	Colton, California
12. W. H. Young	Duarte, California
13. D. Felsenthal	Los Angeles, California

[fol. 1825] SIXTH. This Exchange is organized without shares of stock. The voting power and the property rights and interest of each member shall be as follows:

1. The voting power of the members of this Exchange shall be equal, and each member shall have one vote.

2. The property rights and interest of the members of this Exchange shall be unequal. The general rule applicable to all members by which the property rights and interest of each member may be and are determined and fixed is as follows:

(a) For the purpose of defining the interest of the members in the property of this Exchange, said property shall be divided into two classes, (i) all property and assets acquired for the benefit and service of one or more specified varieties of fruit and paid for by assessments levied against such variety or varieties, and (ii) all other property and assets whatsoever of this Exchange;

(b) The property rights and interest of each member of this Exchange in all property and assets comprising class (i) above described at any time is such a proportion thereof as the total assessments theretofore paid by such member for the acquisition of such property bear to the total assessments theretofore paid for the acquisition of such property by all members;

(c) The property rights and interest of each member of this Exchange at any time in all property of this Exchange comprising class (ii) above described, is such a proportion thereof as the total of all assessments theretofore paid by such member, excluding assessments levied against a specified variety or varieties for the acquisition of the property and assets comprising class (i), bears to the total assessments, excluding such assessments levied against a specified variety or varieties, theretofore paid by all members.

It is agreed that either or both of said classes of property and assets, and/or any other class of property and

assets which may be hereafter established, may be put upon a revolving fund basis by a resolution approved and adopted by the board of directors of this Exchange, and approved by the vote or written consent of members of this Exchange holding at least two-thirds of the voting power and holding at least two-thirds of the property rights and interest of the class of property and assets to be affected by said revolving fund. In like manner and by like vote or consent any revolving fund so established may be from time to time changed, amended, modified or terminated.

2.5. This Section 2.5 establishes a revolving fund plan for certain property and assets of this Exchange of the class described in Section 2(a)(i) of this Article 6th. Said assets comprise all shares of the capital stock of The Exchange Orange Products Company hitherto or hereafter acquired by this Exchange, and said shares shall be deemed to include any increase therein which may be hereafter made, and any property and assets into which the same may be hereafter converted upon dissolution or other change in the form thereof. It is the intent of this Section [fol. 1826] 2.5 that a revolving fund plan shall be and it is hereby established pertaining to said stock (defined as above), the terms of which are as follows:

From and after November 1, 1947, there shall be and there is hereby levied and assessed by Exchange against each member and the group which such member may represent, except as otherwise determined by Exchange through its board of directors pursuant to the authority hereby conferred, in addition to other authorized charges, costs, and assessments, an assessment of not to exceed two cents (2¢) per packed box on all oranges and grapefruit marketed by him or it through Exchange in fresh fruit form or as products. The amount of the assessment and those subject to assessment shall be determined by the board of directors of Exchange, and said assessment may be increased or decreased from time to time, or it may be sus-

pended entirely, and, if so suspended, may thereafter be resumed, all in the discretion of said board of directors. For the purpose of this assessment a packed box is defined as the amount of the particular fruit involved which is contained in the standard packed box, or the equivalent thereof, in common use as determined from time by Exchange. Exchange is authorized to prescribe, and from time to time to change, the relationship or equivalent between the standard packed box and any equivalent thereof. Each member hereby assigns to Exchange the amount of any such assessment and authorizes Exchange to deduct the same from the proceeds of any oranges or grapefruit or orange or grapefruit products marketed by it for him.

The assessments, when collected by Exchange, shall be placed by it in a fund to be known as The Exchange Orange Products Company Revolving Fund. Said fund shall be used as follows: Exchange has on file with its secretary a list entitled The Exchange Orange Products Company Priority List 2(a)(i), which shows the names of those from whom assessments have heretofore been collected by Exchange for the purchase of said stock, and the amount and time of collection thereof, and the total of all assessments paid by members or those whom they represent. Said priority list will be continued to show assessments made pursuant to this plan, and the books and records of Exchange may be construed to constitute a continuation thereof. Payments from said fund to the persons on such priority list shall be made to them in the order of their priority thereon. Exchange is authorized to prescribe the manner of making such payments provided that those substantially prior in point of time shall be paid equitably and prior to payment to those who have made subsequent contribution. Contributors in any one year shall be paid in full before payment is made to the contributors of succeeding years. If the fund is insufficient to pay out in full all persons on the priority list for a given year, payment shall be made to the contributors for that year pro rata. When

the fund reaches such a maximum amount as is deemed proper by Exchange, the assessments thereafter collected by Exchange shall be paid, without interest, to the persons entitled thereto under this plan.

Exchange may at any time and from time to time use said fund or any part thereof for the purchase of additional capital stock of The Exchange Orange Products Company, [fol. 1827] or may apply part of said fund to such purpose and part to revolving fund purposes as set forth in this plan; and at any time when moneys are available in said fund and not immediately required for the aforesaid purposes, Exchange may utilize them as part of its operating capital until they are so required; in the event said Company should be dissolved and its assets should be taken over by Exchange, said fund may in a similar manner be utilized to acquire additional property of like nature and intended for the same general purposes as the plant of said Company. Exchange is authorized to determine the form in which the accounts of the revolving fund shall be kept and the manner in which the rights therein of each person shall be manifested, which may be by entries upon Exchange books.

The obligation of Exchange hereunder to make payments pursuant to the revolving fund plan hereby established shall not create nor shall it be construed to create any indebtedness of Exchange in favor of any person, and the payment to the person entitled thereto is restricted to the property in the fund in which the same shall be at the time invested. All payments under this plan to any persons entitled to payments shall at all times be subordinated to the payment by Exchange of its commercial, banking, and other general creditors, secured or unsecured, and other obligations, and payments hereunder shall not be made when to make the same will weaken the financial standing of Exchange. Nothing herein contained shall be construed to entitle any person on such priority list, or any person who has paid an assessment hereunder, to demand or to receive payment except only in the absolute discretion of

Exchange and as provided in its articles of incorporation and by-laws; and no person shall have the right to demand payment or an accounting under this plan more frequently than once annually, said accounting and payment to be made within a reasonable time after the close of the fiscal year of Exchange.

Exchange shall keep accurate financial accounts of all assessments made pursuant to its articles of incorporation and any marketing contracts between it and its shippers, as well as of all assessment made by it pursuant to the provisions of this plan. Its books showing such assessments and repayments shall be evidence of the property rights of each person therein.

The rights of members under this plan shall be non-negotiable, even though a certificate or other receipt or evidence may be issued by Exchange to evidence said assessments. The extent to which said property rights shall be assignable, and, if permitted, the procedure for any such assignments, shall be as prescribed from time to time by Exchange; provided, however, that nothing herein contained shall authorize or be construed to authorize any such contributor or his successor in interest, if assignment be permitted, to require any payments whatever to be made to him except only pursuant to the terms herein prescribed. If Exchange shall designate an association as a successor, as it is authorized to do by Section 4 of this Article 6th, it is understood and agreed that the rights of such member shall, at the option of Exchange, be carried over into such successor association, and any dissolution or other act referred to in said Section 4 hereof shall not terminate or be deemed to terminate this revolving fund.

[fol. 1828] Full power and authority is hereby conferred upon Exchange to prescribe by resolution or by amendments to its by-laws, and from time to time to change, reasonable rules and regulations concerning this revolving fund, including but not restricted to the time and manner of making assessments, the collection and repayment

thereof, the evidencing of the receipt thereof by Exchange, and the handling and management of assessments and payments; and to do all other acts and things which Exchange deems proper to carry out the purposes for which this revolving fund is established.

The provisions of this revolving fund plan now established may be from time to time changed, amended, modified, or terminated by the vote and in the manner provided in Section 2 of this Article 6th.

2.6. This Section 2.6 establishes a further and separate revolving fund plan for certain property and assets of this Exchange, namely, shares of the capital stock of The Exchange Orange Products Company, as defined in Section 2.5. The terms and conditions of Section 2.5 shall apply to the revolving fund plan established by this Section 2.6 except where inconsistent with the provisions of this Section 2.6. The terms of the revolving fund plan established hereby are as follows:

For the purpose of providing Exchange with additional funds for the purchase of capital stock of The Exchange Orange Products Company distinct and separate from the funds now being provided through the assessment of not to exceed two cents (2¢) per packed box on oranges and grapefruit marketed through Exchange, there is hereby established a supplementary revolving fund plan. For convenience of reference, said previous revolving fund calling for said two cents (2¢) per packed box assessment shall be designated as Revolving Fund "A" and the additional revolving fund provided for herein shall be designated as Revolving Fund "B". For the purpose of said Revolving Fund "B", effective at the start of Exchange's fiscal year 1949-50, there shall be and there is hereby levied and assessed by Exchange against each member and the group which such member may represent, in addition to other authorized charges, costs and assessments, an assessment based upon the net sales value of products, as defined in this paragraph. Said assessment shall be collected and paid

not less often than annually, and may in the discretion of Exchange be collected from time to time in installments, including appropriate installments to be deducted from progress payments on fruit pools. In the event Exchange shall distribute proceeds of sales of products in some other manner than through the use of pools, Exchange, by resolution of its board of directors, may establish another appropriate method or methods of collecting said assessment. For the purpose of this assessment "net sales value" is defined as the amount returned to members in full settlement of each products pool, not including peel products, but not reduced by the amount of this assessment. As used in this paragraph "products" means all orange and grapefruit juice products, including, but not limited to canned single strength juice, frozen concentrate and other concentrate, powdered juices and fruit segments, except that commencing with Exchange's fiscal year 1951-52 "products" shall mean any and all kinds of orange and grapefruit products including but not limited to juice products, and [fol. 1829] except that commencing with Exchange's fiscal year 1952-53 "products" shall mean any and all kinds of orange and grapefruit products including but not limited to juice products and also oranges and grapefruit sold as fruit to outside processors. The rate of said assessment for each crop year shall be determined by the board of directors of Exchange but shall not exceed a maximum of five percent (5%) of the net sales value of the products manufactured by varieties and sold by Exchange for each member. The amount of the assessment shall be determined by the board of directors of Exchange and said assessments may be increased or decreased from time to time, always subject to said maximum percentage, or it may be suspended entirely and, if so suspended, may thereafter be resumed, all in the discretion of said board of directors. All funds provided through Revolving Fund "B" shall be used for the purchase by Exchange of capital stock of The Exchange Orange Products Company until there has been

so purchased a total par value of said stock of three million five hundred thousand dollars ($3,500,000.00), whereupon said monies shall thereafter be devoted to repayments to the earliest contributors to said Revolving Fund "B" in the order of their priority. Each member hereby assigns to Exchange the amount of any assessments under this paragraph and authorizes Exchange to deduct the same from the proceeds of sale of any products marketed by it for him.

2.7. This Section 2.7 establishes a further and separate revolving fund plan for certain property and assets of Sunkist, namely, the land and building acquired to house certain offices of Sunkist Growers, Inc. The terms and conditions of Section 2.5 shall apply to the revolving fund plan established by this Section 2.7 except where inconsistent with the provisions of this Section 2.7. The terms of the revolving fund plan established hereby are as follows:

For the purpose of providing Sunkist with additional funds to finance the acquisition of a site and construction of an office building, there is hereby established a supplementary revolving fund plan. For convenience of reference, the additional revolving fund provided for herein shall be designated as Revolving Fund "C". For the purpose of said Revolving Fund "C", effective at the start of Sunkist's fiscal year 1955-56, there shall be and there is hereby levied and assessed by Sunkist, against each member and the group which such member may represent, in addition to other authorized charges, costs and assessments, an assessment of not to exceed two (2) mills per packed box equivalent on all fruit of all varieties marketed by him or it through Sunkist in fresh fruit form or as products. The amount of the assessment, within said limit, shall be determined by the Board of Directors of Sunkist, and said assessment may be increased or decreased from time to time, or it may be suspended entirely and, if so suspended, may thereafter be resumed, all in the discretion of said Board of Directors. All funds provided through Revolving

Fund "C" shall be used for the acquisition of a site and construction of an office building to be located in Ontario, California, and the total amount of said revolving fund shall not exceed the total cost of said site and building, as approved by the Board of Directors. When said fund equals said cost, any monies thereafter received shall be devoted to repayments to the earliest contributors to said Revolving Fund "C" in the order of their priority. Each [fol. 1830] member hereby assigns to Sunkist the amount of any assessments under this paragraph, and authorizes Sunkist to deduct the same from the proceeds of sale of any fruit marketed by it for him or it.

3. In the event the membership of any member of this Exchange shall terminate, either because of voluntary withdrawal by such member or otherwise, such member shall not thereupon become entitled to demand or receive his interest in the property and assets of this Exchange as herein defined, or to be paid the value thereof in money; but all members of this Exchange shall be entitled to share in the property and assets of this Exchange in accordance with the general rules above set forth only in the event of dissolution and/or liquidation of this Exchange, in which event they shall be entitled to their respective shares in the net assets remaining in accordance with said general rules. For the purpose only of computing property rights and interest under the foregoing general rule, "members" shall mean not only members who are members of and marketing their fruit through this Exchange at the time of dissolution and/or liquidation, but also former members who paid assessments, notwithstanding the fact that the membership of such former members may have terminated as above referred to, but such defmition shall not entitle any such person to vote as a member, after his membership shall have been terminated.

4. In the event this Exchange, by resolution duly adopted by its board of directors, shall at any time determine to

transfer the property and assets of this Exchange to a successor association and shall designate such association as the successor association of this Exchange, then the transfer of said property and assets by this Exchange to such successor association shall not be considered a dissolution or liquidation within the meaning of the foregoing definition. Such successor association may be formed or exist under state or federal laws, provided only it shall be in substance a farmers' nonprofit cooperative marketing association. Such successor association may be an association formed or recognized for such purpose, or it may be formed by merger, consolidation, or any corporate reorganization. Such property rights and interest shall be recognized and preserved in some equitable manner in such successor association.

5. Each member consents and agrees to the foregoing and agrees to be and is bound thereby.

IN WITNESS WHEREOF each of said persons has hereunto subscribed his name and seal, all done this 21st day of June, 1916.

F. Q. STORY
C. C. TEAGUE
W. M. GRISWOLD
G. S. BERRY
H. E. SWAN
W. G. FRASER
C. S. WHITCOMB
J. S. EDWARDS
A. S. HOLDEN
S. B. HAMPTON
ELMER W. HART
W. R. SPROTT
R. C. MERRYMAN
W. W. BACON
P. J. DREHER
A. E. BENNETT
JAMES BARNHILL

[fol. 1831]

NEW CODE OF BY-LAWS
OF
CALIFORNIA FRUIT GROWERS EXCHANGE

Approved and adopted July 5, 1916, as amended.

KNOW ALL MEN BY THESE PRESENTS:

That we, the undersigned, together constituting and being all of the members, directors and Secretary of California Fruit Growers Exchange, a corporation, do hereby adopt the following new code of by-laws:

ARTICLE I

Former By-Laws Repealed.

All formed by-laws of this Exchange are hereby repealed.

ARTICLE II
MEETINGS OF MEMBERS

Section 1. Regular Members' Meetings.

A regular annual meeting of the members shall be held at the office of the Exchange at 2:30 o'clock p.m. on the first Wednesday in December of each year, the first meeting hereunder to be held in December 1953, for the purposes of electing a board of directors and transacting such other business as may come before the meeting.

Section 2. Special Members' Meetings.

Except in those instances where a particular manner of calling a meeting of the members is prescribed by the law or elsewhere in the by-laws of this Exchange, a special meeting of the members may be called at any time by the President, or by the vote of a majority of the board of directors, or by one-third of the members. Each call for

a special meeting of the members shall state the time, place and the purpose of such meeting; if made by the board of directors it shall be by resultion duly adopted and entered in the minutes; if made by the President or by members it shall be in writing, signed by the person or persons making the same, and unless the office of the Secretary be vacant, delivered to the Secretary. No business shall be transacted at a special meeting other than such as is included in the purposes stated in the call.

Section 3. Notice of Regular Members' Meeting.

Ten days' notice of each regular meeting of the members shall be given by order of the President by mail as herein provided. Such notice must state the time and the place of [fol. 1832] the meeting and that the purposes thereof are the election of a board of directors and the transaction of such other business as may come before the meeting, and a copy thereof shall be mailed to each member of the Exchange. Such notices shall be deposited in the post office at Los Angeles, California, with the postage thereon prepaid, at least ten days prior to the time for holding such meeting. Such envelope shall be mailed by the Secretary, but in case the office of Secretary be vacant or he shall refuse or neglect to mail the same, then such notices may be mailed by any director of the Exchange or by any person thereto directed by the President. Such notices shall be addressed to the residence or place of business of the member, as the same shall appear upon the books of the Exchange, and if the residence or place of business of such member does not appear upon the books of the Exchange, and his post office address is unknown to the person mailing such notice, the same shall be addressed to such member at Los Angeles, California.

Section 4. Notice of Members' Special Meeting.

Notice of each special meeting of the members shall be given by mailing to each member a sealed envelope contain-

ing a copy of the call for such meeting and addressed to his residence or place of business as the same shall appear upon the books of the Exchange. Such envelopes shall be deposited in the post office at Los Angeles, California, with the postage thereon prepaid, at least five days prior to the time fixed for such meeting. Such envelopes shall be mailed by the Secretary, but in case the office of the Secretary be vacant or he shall refuse or neglect to mail the same, as provided in this section, then such envelopes containing such copies may be so addressed and mailed by any director of the Exchange or by any person who shall have signed the call for such meeting. If the residence or place of business of any such member does not appear on the books of the Exchange and his post office address is unknown to the person mailing such envelopes, the same shall be addressed to such member at Los Angeles, California.

Section 5. Quorum.

At any meeting of the members a majority of the members being present in person or represented by proxy shall constitute a quorum for all purposes, including the election of directors, except when it is otherwise provided by law.

ARTICLE III

BOARD OF DIRECTORS

Section 1. Number of Directors.

The corporate powers, business and property of the Exchange shall be exercised, conducted and controlled by a board of directors. Said board of directors shall consist of twenty-three (23) directors until such number is changed by amendment of the articles of incorporation or by an amendment to this by-law.

[fol. 1833] *Section 2. Election.*

The directors shall be elected annually at the regular annual meeting of the members from the membership of the Exchange.

Section 3. Vacancies.

Vacancies in the board of directors shall be filled by the other directors in office, and such persons shall hold office until the next regular annual meeting of the members thereafter, except as it is otherwise herein provided.

Section 4. First Meeting of Directors.

Immediately after each election of directors, the newly elected directors shall hold a regular meeting and organize by the election of a President, one or more Vice-Presidents, a Secretary, one or more Assistant Secretaries, a Cashier, one or more Assistant Cashiers, a Treasurer, and at such meeting may choose any or all other officers, agents or employees of the Exchange and transact any other business. The board of directors may also at that, or at any subsequent meeting, by resolution select one or more banks to act as depository of the funds of the Exchange and determine the manner of receiving, depositing and disbursing the funds of the corporation, the form of checks and the person or persons by whom the same shall be signed with power from time to time to change such banks and the person or persons signing said checks and the form thereof. Notice of such meeting is hereby dispensed with.

Section 5. Regular Directors' Meetings.

In addition to the regular meeting mentioned above, a regular meeting of the board of directors shall be held at 9:30 o'clock a.m. on the first and third Wednesdays of each month.

Section 6. Special Directors' Meetings.

A special meeting of the board of directors shall be held whenever called by the President or by one-third of the directors. Any and all business may be transacted at a special meeting. Each call for a special meeting shall be in writing, signed by the person or persons making the same, addressed and delivered to the Secretary, and shall state the time and place of such meeting.

Section 7. Notice of Regular Meeting of Directors.

No notice of the regular meetings of the directors need be given but each director shall take notice thereof. Notice of such meeting is hereby dispensed with.

Section 8. Notice of Special Meeting of Directors.

Notice of each special meeting of the directors shall be given by mailing to each director a sealed envelope containing a copy of the call for such meeting, addressed to his residence or place of business. Such envelopes shall be deposited in the post office at Los Angeles, California, with the postage thereon prepaid, at least two days prior to the [fol. 1834] time of such meeting. Such envelopes shall be mailed to the Secretary, but in case he is unable or refuses to act, such envelopes may be so addressed and mailed by any person who shall have signed the call for such meeting.

Section 9. Quorum for Special Purpose.

A majority of the authorized number of directors shall be necessary to constitute a quorum for the transaction of business; provided, however, that in the absence of a quorum of directors who have been previously regularly seated, the quorum for the purposes of accepting resignations of directors and seating instead of such resigned directors persons nominated by district exchanges to act for them as members in and directors of Sunkist shall be one-third the authorized number of directors.

ARTICLE IV

POWER OF DIRECTORS

The directors shall have power:

1. To call special meetings of the members when they deem it necessary. And they shall call a meeting at any time upon the written request of one-third of the members.

2. To appoint and remove, at pleasure, all officers, agents and employees of the Exchange, prescribe their duties, fix their compensation, and require from them, if deemed advisable, security for faithful service.

3. To conduct, manage and control the affairs and business of the Exchange and to make rules and regulations not inconsistent with the laws of the State of California, the articles of incorporation of the Exchange or its by-laws for the guidance of the officers and management of its affairs.

ARTICLE V

DUTIES OF DIRECTORS

It shall be the duty of the directors:

1. To keep a complete record of all their business transactions, to keep minutes and acts, and of the proceedings of the members, and furnish the members a full report after the close of each fiscal year and within the period required by law, showing in detail the condition of the affairs of the Exchange. A similar report shall be presented at any meeting of the members when thereto required by at least one-third of the members of the Exchange.

2. To supervise all officers, agents and employees and see that their duties are properly performed. To cause to be issued to the members appropriate certificates of membership as prescribed by order of the board of directors.

[fol. 1835] 3. To carry out and faithfully perform the terms of all contracts which shall be made by this Exchange with the several District Exchanges, as well as the terms of all other contracts which may be entered into by this Exchange.

4. The directors shall receive no compensation or expenses from the Exchange for their services in acting as directors of the Exchange.

ARTICLE VI

OFFICERS

The officers of the Sunkist shall be a President, one or more Vice-Presidents, a Secretary, one or more Assistant Secretaries, a Cashier, one or more Assistant Cashiers, a Treasurer, one or more Assistant Treasurers and a General Manager, together with any other officers which the board of directors may see fit in its discretion to provide for by resolution entered upon its minutes.

The compensation and tenure of office of all officers of Sunkist other than directors shall be fixed and determined by the board of directors.

ARTICLE VII

THE PRESIDENT

The board of directors shall, at their first regular meeting, elect one of their number to act as President; and if at any time the President shall be unable to act, any Vice-President shall take his place and perform his duties; and if the Vice-Presidents from any cause shall be unable to act, the board shall appoint one of its members to act, in whom shall be vested for the time being all of the duties and functions of President. The President, or in his absence such Vice-President or director acting as President, shall:

1. Preside over all meetings of the members and directors.

2. Sign, as President, all certificates of membership, and all contracts and other instruments which have been first approved by the board of directors.

3. Call the directors together whenever he deems it necessary, and discharge such other duties as may be required of him by these by-laws.

ARTICLE VIII

SECRETARY

It shall be the duty of the Secretary:

1. To keep a journal of all meetings of the directors [fol. 1836] and members of the Exchange, with the time and place of holding the same; whether regular or special, and if special, its object, how authorized, and the notice thereof given. The record must embrace every act done or ordered to be done; who were present and who absent; and, if requested by any director or member, the time shall be noted when he entered the meeting or obtained leave of absence therefrom. On a similar request, the ayes and noes must be taken on any proposition, and a record thereof made. On similar request, the protest of any director or member to any action or proposed action must be entered in full.

2. To keep the corporate seal of the Exchange and, when directed to do so by the Exchange, affix the same to all papers requiring the corporate seal.

3. To keep a proper membership book, showing the name of each member of the Exchange, the number of his membership certificate, and the date of its issuance, surrender, cancellation, forfeiture or transfer.

4. To discharge such other duties as pertain to his office and as are prescribed by the board of directors.

5. To serve all notices required either by law or by the by-laws of the Exchange. In case of his absence, inability,

refusal or neglect so to do, such notices may be served by any person thereunto directed by the President or any Vice-President of the Exchange.

ARTICLE IX

TREASURER

The Treasurer shall:

1. Receive and keep all of the moneys of the Exchange, provided, however, that all moneys arising from the sale of fruit or otherwise belonging to or coming into the possession of the Exchange, shall be by the Treasurer immediately deposited in such bank or banks as shall be designated from time to time by the board of directors, and no moneys shall be withdrawn from such banks except upon check of the Exchange, signed by the cashier, any Assistant Cashier, or the Treasurer, and countersigned by the Secretary, any Assistant Secretary, President or any Vice-President, or otherwise, as the board of directors may from to time by its resolution prescribe. Provided, however, that moneys deposited from sale of fruit may be withdrawn from one bank for deposit to the credit of Exchange in another upon check of the Exchange signed by the Cashier, any Assistant Cashier, or the Treasurer. Any moneys so arising from the sale of fruit or otherwise coming into the possession of the Exchange may, pending payment thereof to the shipper or other person entitled thereto, be used and employed by the Exchange under such regulations and for such time as the board of directors may from time to time by its resolution prescribe.

2. At each annual meeting of the members, and as often as the board of directors may require it to be done, submit [fol. 1837] for their inspection a complete statement of his accounts, with proper vouchers, and at each and every regular meeting of the board of directors he shall submit a statement showing the receipts, disbursements and balances on hand. He shall discharge such other duties appertaining to his office as shall be prescribed by the board of direc-

tors, and shall furnish such bond from time to time as the board of directors may require.

ARTICLE X

AUDITING COMMITTEE

The board of directors of the Exchange may by resolution provide for the appointment or selection of an auditing committee from among its members, determine the number of its members and its tenure of office. It shall be the duty of this auditing committee to meet at least once a month to pass upon all accounts and expenditures of the Exchange.

ARTICLE XI

BOOKS AND PAPERS

All books and records of this Exchange shall at all times in business hours be subject to the inspection of the board of directors or any member.

ARTICLE XII

MEMBERSHIP AND VOTING

The general purpose for which the Exchange is instituted is to furnish the facilities and agencies through which the citrus fruits and their by-products of its members and growers represented by them may be marketed and distributed upon a uniform plan and in such manner as to bring about a standard of quality, a more uniform distribution and a larger consumption thereof in the markets of the United States and in other places. In order to make such facilities and agencies available to the grower, the plan of the Exchange includes the organization of the growers into "Local Associations" and the affiliation of those local associations into "District Exchanges".

EXCHANGE MEMBERSHIP

This Exchange will have as many members as there are District Exchanges under contract, as such, with this Ex-

change. Each District Exchange will nominate some person to act for it as its member in this Exchange. This Exchange will have as many directors as it has District Exchange members, so that each member thus nominated by the District Exchange will also be a director of this Exchange.

Each District Exchange may at will, and as often as it desires, change its member representative in this Exchange. [fol. 1838] Upon the certification of a new representative to the board of directors of this Exchange, the membership of the former representative of such District Exchange shall absolutely cease and terminate. Such new representative shall thereupon be elected by this Exchange as one of its directors in place of the former member.

This Exchange shall issue a certificate of membership to each member but neither said membership nor said certificate thereof shall be assigned by a member to any other person or corporation, nor shall the assignee or transferee thereof be entitled to membership in this Exchange or become a member of this Exchange by virtue of such transfer. The board of directors may, however, by motion duly adopted by it, consent to such assignment and transfer and to the acceptance of the assignee or transferee as a member of this Exchange, but it is expressly understood and agreed between all of the members that no membership shall be transferred or any membership certificate assigned unless with the consent of the board of directors of this Exchange first had and received. However, when a District Exchange desires to change its member representative in this Exchange from one person to another, the board of directors of this Exchange shall recognize the transfer and assignment of such membership and issue a new membership certificate to such new representative. The manner in which the District Exchange may indicate that it desires to change its representative as well as the method by which any change of such representative is to be brought about, shall be determined by the board of directors of this Exchange by resolution entered upon its minutes.

No person shall be a member of this Exchange unless he and the District Exchange which he represents markets all of the citrus fruits which he and it has to market or dispose of through the facilities and agencies afforded by this Exchange, and if any member or District Exchange shall cease, fail, neglect or refuse for any reason whatsoever to market the whole of such citrus fruits through this Exchange, then in that event the membership of such member and of such District Exchange in this Exchange shall ipso facto cease and terminate, and the membership certificate of such member and his membership in this Exchange shall be canceled.

Each District Exchange agrees that it will require each of the Local Associations composing its membership to enter into uniform contracts with it in such manner and form as may be prescribed by the board of directors of this Exchange, which contracts will require each Local Association to market all of the citrus fruit which it has to market or dispose of through this Exchange and said District Exchange.

The voting power and property rights shall be as shown in the articles of incorporation of this Exchange.

The Exchange shall have power from time to time to admit additional members to its organization whenever there shall be in its opinion sufficient reason to make an additional District Exchange advisable, which new member (and the District Exchange which such member represents) shall be entitled to vote and to contribute to and share [fol. 1839] in the property of the Exchange with the former members, in accordance with the general rule set forth in the articles of incorporation of this Exchange, it being the purpose of this Exchange that its facilities be available all times and upon equal terms to all growers of citrus fruits, provided only that such growers shall have first provided themselves with proper local association and district exchange facilities.

ARTICLE XIII

PROXIES

Any member shall be permitted to vote at any meeting of the members, either regular or special, by proxy, which proxy shall be in writing executed by the member in the manner and form required or permitted by law.

ARTICLE XIV

GENERAL MANAGER

The board of directors may in its discretion appoint a General Manager who shall hold office at the pleasure of the board of directors. Any director or other person may be elected to serve as General Manager. The General Manager shall have such authority and shall perform such duties as are incident to the office.

ARTICLE XV

RE BORROWING MONEY

The board of directors shall have the power to incur indebtedness, and the terms and amount thereof shall be entered in the minutes.

ARTICLE XVI

SEAL

The board of directors shall provide a suitable seal containing the name of the Exchange, the date of its incorporation and other appropriate words, and may alter the same at pleasure.

ARTICLE XVII

AMENDMENT

These by-laws may be altered or amended at any annual meeting of the members or at any other meeting of the members called for that purpose by the directors, by a vote representing two-thirds of the members. The written assent of two-thirds of the members is effectual to repeal or amend any by-law or to adopt additional by-laws.

[fol. 1840]

EXHIBIT D TO STIPULATION

INCORPORATED UNDER THE LAWS OF
THE STATE OF CALIFORNIA
MARCH 27, 1905

No._____

Sunkist Growers, Inc.

MEMBERSHIP CERTIFICATE

This Certifies that.....is a member of

Sunkist Growers, Inc.

herein termed "Sunkist," a nonprofit cooperative marketing association, without capital stock, subject at all times to the provisions and contracts contained in its articles of incorporation and by-laws; and said member by the acceptance hereof and of membership in Sunkist does hereby agree both for himself and for any transferee of his to be bound by said articles of incorporation and by-laws and all rules and regulations of Sunkist now in force or hereafter adopted.

The articles of incorporation of Sunkist provide that the voting power of the members of Sunkist is equal and each member has one vote, and that the property rights and interest of the members are unequal. The general rule applicable to all members by which the property rights and interest of each member are determined and fixed is set forth in Article 6th of said articles of incorporation. Said articles of incorporation authorize the levying of assessments by Sunkist against each member and the group which such member may represent. Reference is hereby made to said articles of incorporation for particulars as to said matters.

The by-laws of Sunkist contain restrictions upon transfer. A copy of Article XII of the by-laws containing such restrictions upon transfer is set forth on the reverse of this certificate.

WITNESS the seal of Sunkist Growers, Inc. and the signatures of its duly authorized officers.

DATED this.....day of....., 19.....

_____ SECRETARY

_____ PRESIDENT

FOR VALUE RECEIVED, the undersigned, a member of Sunkist Growers, Inc., herein called "Sunkist," hereby transfers and assigns this certificate and all his rights thereunder and in and to said Sunkist and in and to all contracts contained in the articles of incorporation and by-laws of Sunkist and in and to the contracts and resolutions referred to in this certificate and in and to all revolving fund credits now or hereafter accruing thereunder, to.....

.....,

which transferee by this transfer and assignment shall be bound by all terms, conditions and contracts contained in the articles of incorporation and by-laws of Sunkist, and said contracts and resolutions, and said transferee does by the acceptance of this transfer and assignment agree to be bound thereby and to so acknowledge in writing. This transfer and assignment shall not be effective, however, until after the consent of said Sunkist shall have been obtained.

DATED this.....day of.....,

19.....

.....

Witness:

.....

Article XII of the by-laws of Sunkist Growers, Inc., which association is sometimes referred to in said by-laws as "Exchange", reads as follows:

Article XII.

Membership and Voting.

The general purpose for which the Exchange is instituted is to furnish the facilities and agencies through which the citrus fruits and their by-products of its members and growers represented by them may be marketed and distributed upon a uniform plan and in such manner as to bring about a standard of quality, a more uniform distribution and a larger consumption thereof in the markets of the United States and in other places. In order to make such facilities and agencies available to the grower, the plan of the Exchange includes the organization of the growers into "Local Associations" and the affiliation of those local associations into "District Exchanges".

Exchange Membership

This Exchange will have as many members as there are District Exchanges under contract, as such, with this Exchange. Each District Exchange will nominate some person to act for it as its member in this Exchange. This Exchange will have as many directors as it has District Exchange members, so that each member thus nominated by the District Exchange will also be a director of this Exchange.

Each District Exchange may at will, and as often as it desires, change its member representative in this Exchange. Upon the certification of a new representative to the board of directors of this Exchange, the membership of the former representative of such District Exchange shall absolutely cease and terminate. Such new representative shall thereupon be elected by this Exchange as one of its directors in place of the former member.

This Exchange shall issue a certificate of membership to each member but neither said membership nor said certificate thereof shall be assigned by a member to any other person or corporation, nor shall the assignee or transferee thereof be entitled to membership in this Exchange or become a member of this Exchange by virtue of such transfer. The board of directors may, however, by motion duly adopted by it, consent to such assignment and transfer and to the acceptance of the assignee or transferee as a member of this Exchange, but it is expressly understood and agreed between all of the members that no membership shall be transferred or any membership certificate assigned unless with the consent of the board of directors of this Exchange first had and received. However, when a District Exchange desires to change its member representative in this Exchange from one person to another, the board of directors of this Exchange shall recognize the transfer and assignment of such membership and issue a new membership certificate to such new representative. The manner in which the District Exchange may indicate that it desires to change its representative as well as the method by which any change of such representative is to be brought about, shall be determined by the board of directors of this Exchange by resolution entered upon its minutes.

No person shall be a member of this Exchange unless he and the District Exchange which he represents markets all of the citrus fruits which he and it has to market or dispose of through the facilities and agencies afforded by this Exchange, and if any member or District Exchange shall cease, fail, neglect or refuse for any reason whatsoever to market the whole of such citrus fruits through this Exchange, then in that event the membership of such member and of such District Exchange in this Exchange shall ipso facto cease and terminate, and the membership certificate of such member and his membership in this Exchange shall be canceled.

Each District Exchange agrees that it will require each of the Local Associations composing its membership to enter into uniform contracts with it in such manner and form as may be prescribed by the board of directors of this Exchange, which contracts will require each Local Association to market all of the citrus fruit which it has to market or dispose of through this Exchange and said District Exchange.

The voting power and property rights shall be as shown in the articles of incorporation of this Exchange.

The Exchange shall have power from time to time to admit additional members to its organization whenever there shall be in its opinion sufficient reason to make an additional District Exchange advisable, which new member (and the District Exchange which such member represents) shall be entitled to vote and to contribute to and share in the property of the Exchange with the former members, in accordance with the general rule set forth in the articles of incorporation of this Exchange, it being the purpose of this Exchange that its facilities be available all times and upon equal terms to all growers of citrus fruits, provided only that such growers shall have first provided themselves with proper local association and district exchange facilities.

[fol. 1842]

EXHIBIT E TO STIPULATION

ARTICLES OF INCORPORATION
OF
THE EXCHANGE ORANGE PRODUCTS COMPANY

KNOW ALL MEN BY THESE PRESENTS:

That we, the undersigned, all of whom are residents and citizens of the State of California, have this day voluntarily associated ourselves together for the purpose of forming a corporation under the general laws of the State of California, and for such purpose

WE HEREBY CERTIFY: z

1st

The Name.

That the name of said corporation is and shall be

THE EXCHANGE ORANGE PRODUCTS COMPANY

2nd

The Purposes.

That the purposes for which it is incorporated are:

(a) To acquire and to take over, as a going concern, the business, either in whole or in part, now carried on by Exchange Orange Products Company, a corporation, with its principal place of business at Los Angeles, California, and in connection therewith to purchase its good will and business and all or any of its assets and to pay for such property in cash or stock of this corporation or otherwise, and to exercise all of the powers necessary or incident to the conduct of such business.

(b) To purchase or otherwise acquire, receive, press, treat, extract and otherwise handle oranges with a view to

converting them into orange food products and by-products such as marmalades, jams, jellies, orange oil, orange peel and other orange products and by-products.

(c) To purchase or otherwise acquire, receive, press, treat, extract, and otherwise handle lemons, with a view to converting them into their derivatives, such as citrate of lime, citric acid, lemon oil, candied peel, lemon juice, and other by-products.

(d) To purchase or otherwise acquire, receive, treat, and otherwise handle grapefruit, with a view to converting them into all necessary or proper residual or by-products, or in connection with any other operations of the Company.

[fol. 1843] (e) To purchase, sell, deal in, and handle all products of agriculture and horticulture, and to treat and render salable all by-products and residual products therefrom.

(f) To purchase or otherwise acquire, own, hold, improve, cultivate, lease, mortgage, sell, and convey real estate or any right or interest therein or appurtenant thereto; to purchase or otherwise acquire, manufacture, own, hold, lease, mortgage, sell and convey personal property of any kind.

(g) To obtain, register, purchase, or otherwise acquire; to hold, use, own, operate, develop, and introduce; to sell, assign, lease, pledge, or mortgage; to acquire or grant licenses in respect of; and otherwise generally to deal in and turn to account any and all copyrights, concessions, trademarks, trade names, distinctive marks or devices, formulae, secret or other unpatented processes, patents, patent rights, applications for patents, and all inventions, processes, improvements secured under Letters Patent or otherwise, of the United States of America or of any other Government or Country, relating to or used, useful, or convenient in the accomplishment of any of the purposes herein set forth.

(h) To subscribe or cause to be subscribed for, and to purchase or otherwise acquire, hold, own, sell, assign, transfer, mortgage, pledge, hypothecate, transfer in trust, exchange, distribute, or otherwise dispose of the whole or any part of the shares of the capital stock, bonds, coupons, mortgages, deeds of trust, debentures, securities, evidences of indebtedness, notes or other obligations, good will, rights, assets and property of any and every kind, or any part thereof, of any other corporation or corporations, association or associations, or of any joint stock company, or partnership now or hereafter existing and whether created under or by virtue of the laws of the State of California, or of any other state, territory, district, government, or country, or otherwise, and to operate, manage, and control such properties or any of them, either in the name of any such corporation, association, joint stock company or partnership, or of this corporation, and while the owner or holder of any of said shares of capital stock or of such bonds, coupons, mortgages, deeds of trust, debentures, evidences of indebtedness, notes or other securities, to exercise all of the rights, powers, and privileges that the owner or holder thereof, if a natural person, might or could exercise, including the right to vote thereon, and to appoint a proxy for that purpose, from time to time, as fully as and to the same extent that a natural person, being the owner or holder thereof, might or could do.

(i) To borrow money of any person, firm or corporation, and to secure the payment thereof by note, mortgage, bond or deed of trust or other evidence of indebtedness or by any other lawful means, and to take and receive notes, bonds, mortgages, deeds of trust or any evidence of indebtedness for the use and benefit of said corporation.

(j) To do, perform and conduct every, all or any matter, [fol. 1844] thing, business or undertaking necessary, proper or lawful to carry into effect any of the foregoing powers.

(k) The several clauses contained in this statement of purposes shall be construed as both purposes and powers,

and the statements contained in each clause shall, except where otherwise expressed, be in no wise limited or restricted by reference to, or inference from, the terms of any other clause, but shall be regarded as independent purposes and powers.

No stockholder of this corporation shall have the right to require the corporation or its directors to so conduct its business as to earn a corporate profit or to declare a dividend it being expressly agreed and understood that the proceeds of sale, less the necessary selling costs and expense, is to be turned back to the grower stockholders of the corporation, on the basis of the quantity of product furnished by them to this corporation, all upon terms to be set forth in a contract or contracts to be made from time to time between this corporation and its said grower stockholders.

3rd

Place Where Principal Business is to be Transacted.

That the place where the principal business of said corporation is to be transacted is the City of San Dimas, County of Los Angeles, State of California.

4th

Term for which to Exist.

That the term for which said corporation is to exist is fifty (50) years from and after the date of its incorporation.

5th

Number of Directors.

That the number of directors of said corporation shall be eleven (11), and the names and residences of those who are appointed for the first year and to serve until the election and qualification of such officers are as follows:

Names	*Residences*
N. T. Edwards	Whittier, California
D. C. Crookshank	Pomona, California
Louis A. Brundige	Whittier, California
Joy G. Jameson	Corona, California
A. B. Shaw	Pasadena, California
W. K. Beattie	Upland, California
E. T. Cassel	San Dimas, California
J. S. Edwards	Redlands, California
R. K. Pitzer	Pomona, California
John I. Cumming	Rialto, California
A. E. Bennett	Tustin, California

[fol. 1845]

6th

Amount of Capital Stock.

That the amount of the capital stock of said corporation is One Hundred and Fifty Thousand ($150,000.00) Dollars, and the number of shares into which it is divided is fifteen thousand (15,000) shares, and the par value of each of said shares is Ten ($10.00) Dollars.

7th

Capital Stock Actually Subscribed.

That the amount of said capital stock which has been actually subscribed is One Hundred Ten ($110.00) Dollars, and the following are the names of the persons by whom the same has been subscribed, together with the number of shares and the amount actually subscribed by each, namely:

Names of Subscribers	*No. of Shares*	*Amount*
N. T. Edwards	One	$10.00
D. C. Crookshank	One	10.00
Louis A. Brundige	One	10.00
Joy G. Jameson	One	10.00
A. B. Shaw	One	10.00
W. K. Beattie	One	10.00
E. T. Cassel	One	10.00
J. S. Edwards	One	10.00
R. K. Pitzer	One	10.00
John I. Cumming	One	10.00
A. E. Bennett	One	10.00

Signatures to Articles of Incorporation of THE EXCHANGE ORANGE PRODUCTS COMPANY.

IN WITNESS WHEREOF, we have hereunto set our hands and seals as of this 24th day of September, 1920.

N. T. Edwards
D. C. Crookshank
Louis A. Brundige
Joy G. Jameson
A. B. Shaw
W. K. Beattie
E. T. Cassel
J. S. Edwards
R. K. Pitzer
John I. Cumming
A. E. Bennett

[fol. 1846]

BY-LAWS OF
THE EXCHANGE ORANGE PRODUCTS COMPANY

ARTICLE I
MEETINGS OF SHAREHOLDERS

Section 1. Regular Meetings.

A regular meeting of the shareholders shall be held at the place hereinafter in these by-laws provided for the holding of meetings of the shareholders, at 3:00 o'clock p.m., on the first Wednesday in December of each year, the first meeting hereunder to be held in December, 1953, for the purpose of electing a board of directors and transacting such other business as may come before the meeting.

Section 2. Special Meetings.

Except in those instances where a particular manner of calling a meeting of the shareholders is prescribed by law or elsewhere in these by-laws, a special meeting of the shareholders may be called at any time by the president or any vice president or by the board of directors, or by the holders of not less than one-third of the shares then issued and outstanding. Each call for a special meeting of the shareholders shall state the time, place, and the purpose of such meeting; if made by the board of directors it shall be by resolution duly adopted by a majority vote and entered in the minutes; if made by the president or a vice president or by the shareholders, it shall be in writing and signed by the person or persons making the same, and unless the office of secretary be vacant, delivered to the secretary. No business shall be transacted at a special meeting other than as is stated in the call and the notice based thereon.

Section 3. Notice of Regular and Special Meetings of the Shareholders.

(a) No notice need be given of the regular meeting of the shareholders, but each shareholder shall take notice thereof.

(b) Notice of each special meeting of the shareholders of the corporation shall be given by mailing to each of the shareholders of the corporation a notice of the time, place, and purpose of such meeting, addressed to such shareholder at his residence or place of business as the same shall appear upon the books of the corporation. Notices of each special meeting shall be deposited in a United States Post Office or mail box or mail chute or other agency thereof at any place within the County where at the time of such mailing the principal office for the transaction of the business of the corporation is located, with the postage thereon prepaid, at least five days prior to the time fixed for such meeting. If the residence or place of business of a share-

holder does not appear on the books of the corporation [fol. 1847] and his post office address is unknown to the person mailing such notices, the same shall be addressed to him at the place where at the time of such mailing the principal office for the transaction of the business of the corporation is located.

Section 4. Quorum.

At any meeting of the shareholders the presence in person or by proxy of the holders of a majority of the shares entitled to vote at any meeting shall constitute a quorum for the transaction of business, except when it is otherwise provided by law. Any regular or special meeting of the shareholders may adjourn from day to day, or from time to time, if, for any reason, there are not present in person or by proxy the holders of a majority of the shares entitled to vote at said meeting, . . if no election is had, such adjournment and the reasons therefor being recorded in the minutes of the proceedings.

Section 5. Waiver of Notice.

When all of the shareholders of the corporation are present at any meeting, or when the shareholders not represented thereat give their written consent to the holding thereof at the time and place the meeting is held, and such written consent is made a part of the records of such meeting, the proceedings had at such meetings are valid, irrespective of the manner in which the meeting is called or the place where it is held.

ARTICLE II

BOARD OF DIRECTORS

Section 1. Number—Quorum.

The business of the corporation shall be managed by a board of directors of such number of directors as the share-

holders may from time to time determine in the manner prescribed by law. A majority of the prescribed number of directors shall be necessary to constitute a quorum for the transaction of business; provided however that in the absence of a quorum of directors who have been previously regularly seated, the quorum for the purpose of accepting resignations of directors and seating instead of such resigned directors persons nominated by district exchanges as their representatives to this board of directors shall be one-third the authorized number of directors. Every act or decision of a majority of the directors present, at a meeting at which a quorum is present, made or done when duly assembled, shall be valid as the act of the board of directors; provided however, that in the absence of a quorum a majority of the directors present at any directors' meeting may adjourn from time to time until the time fixed for the next regular meeting of the board, but may not transact any other business.

Section 2. Election and Eligibility.

The directors must be elected annually at the regular meeting of the shareholders as provided by law; they need [fol. 1848] not be shareholders. No person shall be eligible to be elected or to act as such director unless he is at the time of his election a director of California Fruit Growers Exchange, and if any person while a member of the board of directors of this corporation ceases to be a director of California Fruit Growers Exchange his seat as a director of this corporation may be declared vacant by the board of directors of this corporation.

Section 3. Vacancies.

Vacancies in the board of directors may be filled by a majority of the remaining directors, though less than a quorum, and each director so elected shall hold office until his successor is elected at the next annual meeting of the

shareholders or at any special meeting duly called for that purpose prior thereto. A vacancy shall be deemed to exist in case the shareholders shall increase the authorized number of directors, but shall fail, for a period of thirty days from the effective date of such increase, to elect the additional directors so provided for, or in case the shareholders fail at any time to elect the full number of authorized directors. When one or more of the directors shall give notice of his or their resignation to the board, effective at a future date, the board shall have the power to fill such vacancy or vacancies to take effect when such resignation becomes effective. Each director so appointed shall hold office during the remainder of the term of office of the resigning director or directors or until their successors are appointed and qualify.

Section 4. First Meeting of Directors.

Upon their election the directors shall meet and organize by the election of a president, a secretary, and a treasurer. They may also at that meeting or at a later meeting elect such other officers as are provided for by these by-laws or permitted by law.

Section 5. Regular Meetings.

In addition to the regular meetings mentioned above, a regular meeting of the board of directors shall be held at 9:30 o'clock a.m. on Wednesday of each week.

Section 6. Special Meetings.

A special meeting of the board of directors shall be held whenever called by the president or any vice president or by five directors. Any and all business may be transacted at a special meeting. Each call for a special meeting shall be in writing, signed by the person or persons making the same, addressed and delivered to the secretary, and shall state the time and place of such meeting.

Section 7. Notice of Regular and Special Meetings of the Directors.

No notice shall be required to be given of any regular meeting of the board of directors, but each director shall take notice thereof. Notice of each special meeting of the board of directors shall be given to each of the directors by mailing to each of them a copy of such notice at least 72 [fol. 1849] hours prior to the time fixed for such meeting, to the address of such director as shown on the books of the corporation. If his address does not appear upon the books of the corporation, then such notice shall be addressed to him at the place where at the time of such mailing the principal office for the transaction of the business of the corporation is located.

Section 8. Waiver of Notice.

When all the directors of the corporation are present at any directors' meeting, however called or noticed, and sign a written consent thereto, on the records of such meeting, or if the majority of the directors are present, and if those not present sign in writing a waiver of notice of such meeting, whether prior to or after the holding of such meeting, which said waiver shall be filed with the secretary of the corporation, the transactions of such meeting are as valid as if had at a meeting regularly called and noticed.

ARTICLE III

POWERS OF DIRECTORS

The Directors shall have power:

1. To call special meetings of the shareholders when they deem it necessary; and they shall call a meeting at any time upon the written request of shareholders holding one-third of all of the shares.

2. To appoint and remove at pleasure all officers, agents, and employees of the corporation, prescribe their duties,

fix their compensation, and to require from them security for faithful service.

3. To create and appoint committees, offices, officers, and agents of the corporation, and to prescribe and from time to time change their duties and compensation.

4. To conduct, manage, and control the affairs and business of the corporation and to make rules and regulations not inconsistent with the laws of the State of California or the by-laws of the corporation for the guidance of the officers and management of the affairs of the corporation.

5. To levy and collect assessments upon all shares of stock of the corporation in the manner and form, and to the extent provided in the articles of incorporation.

ARTICLE IV

DUTIES OF DIRECTORS

It shall be the duty of the directors:

1. To cause to be kept a complete record of all their minutes and acts, and of the proceedings of the share-[fol. 1850] holders, and present a full statement at the regular annual meeting of the shareholders, showing in detail the assets and liabilities of the corporation, and generally the conditions of its affairs. A similar statement shall be presented at any other meeting of the shareholders when required by persons holding at least one-half of the shares of the corporation.

2. To supervise all officers, agents, and employees and see that their duties are properly performed. To cause to be issued to the shareholders, in proportion to their several interests, certificates of stock.

ARTICLE V
OFFICERS

The officers shall be a president, a secretary, and a treasurer, and the board of directors may also appoint a chairman of the board, which officers shall be elected by and hold office at the pleasure of the board of directors. In addition the board of directors may also appoint one or more vice presidents, and provide that one or more of such vice presidents need not be members of the board of directors, one or more assistant secretaries, and one or more assistant treasurers. Any two or more of such offices, except those of president and secretary, may be held by the same person. Any vice president, except a vice president who is not a member of the board of directors, may exercise any of the powers of the president; any assistant treasurer may exercise any of the powers of the treasurer; and any assistant secretary may exercise any of the powers of the secretary, as provided in these by-laws or as directed by the board of directors, and such officer shall perform such other duties as may be imposed upon them. The compensation and tenure of office of all the officers of the corporation (other than directors) shall be fixed and determined by the board of directors.

ARTICLE VI
PRESIDENT

The board of directors shall, at their first regular meeting, elect one of their number to act as president; and if at any time the president shall be unable to act, the vice president shall act in his place and perform his duties; if there is more than one vice president, the first vice president shall act, and in case of his absence or inability to act, the second vice president shall act, and so on in sequence; if the vice president or vice presidents, from any cause, shall be unable to act, they shall appoint some other member of the board to do so, in whom shall be vested, for

the time being, all the duties and functions of president. No vice president shall ever exercise any of the functions of president unless he is at the time a member of the board of directors.

The president (or person acting as such) shall

[fol. 1851] 1. Preside over all meetings of the shareholders and directors.

2. Sign, as president, contracts and other instruments in writing, if, when, and as directed so to do by the board of directors, which, however, may authorize such contracts and other instruments in writing instead of being signed by the president, to be signed by any officer or person. The president may sign certificates of stock as provided in Article X hereof.

3. Call the directors together when he deems it necessary and shall have, subject to the advice of the directors, direction of the affairs of the corporation; and generally, shall discharge such other duties as may be required of him by the by-laws of the corporation.

ARTICLE VII

SECRETARY

The board of directors shall elect a secretary.

1. It shall be the duty of the secretary to keep a record of the proceedings of the board of directors and of the shareholders. He shall keep the corporate seal of the corporation, and the book of blank certificates of stock, fill up and countersign all certificates issued, and make the corresponding entries in the margin of such book on such issuance, and affix said corporate seal to all papers requiring it. He shall keep a proper transfer book, and a stock ledger in debit and credit form, showing the number of shares issued and transferred by any shareholder, and the dates of such issuance and transfer. He shall discharge such other duties as pertain to his office, or which may be prescribed by the board of directors.

2. Whenever it is provided in these by-laws that notice shall be given either of regular or special meetings of the shareholders, regular or special meetings of the directors, or otherwise, such notice shall be given by the secretary, or by the president, a vice president, or by any person designated by either of them, or by any person who shall have signed the call for such meeting. Any notice which the secretary may give or serve, or act required to be done by him, may with like effect be given or served or done by an assistant secretary.

ARTICLE VIII

TREASURER

The treasurer shall receive and keep all the funds of the corporation and pay them out only on checks or otherwise, as directed by the board of directors, provided, however, the board of directors may provide for a depositary of the funds of the corporation, and may by resolution prescribe the manner in which said funds shall be drawn from said depositary.

[fol. 1852]

ARTICLE IX

BOOKS AND PAPERS

All of the records belonging to the corporation shall at all times, in business hours, be open to the inspection of any director or bona fide shareholder thereof, subject at all times to the authority conferred upon the board of directors by Section 377 of the Civil Code of California.

ARTICLE X

CERTIFICATES OF STOCK

Certificates of stock shall be of such form and device as the board of directors may direct, and shall be signed by the president or a vice president and the secretary or an

assistant secretary. Each certificate shall express on its face its number, date of issuance, the number of shares for which and the person to whom it is issued and such other matters as may be required by law.

The certificate book shall contain a margin on which shall be entered the number, date, number of shares, and the name of the person expressed in the corresponding certificate.

Certificates of stock may be issued prior to full payment, in harmony with any permit issued by the Commissioner of Corporations for that purpose, or as is otherwise allowed by law, but any certificate issued prior to full payment must show on its face what amount has been paid thereon.

ARTICLE XI

TRANSFER OF STOCK

Shares of stock of the corporation may be transferred at any time by the holders, or by power of attorney, or by their legal representatives, by endorsement on the certificate of stock. But no transfer is valid until the surrender of the endorsed certificate. A surrendered certificate shall be delivered up for cancellation before a new one is issued in lieu thereof, and the secretary shall preserve the certificate so cancelled, as a voucher. If, however, a certificate is lost or destroyed, the board of directors may order a new certificate issued as is by law required or permitted.

ARTICLE XII

VOTING

At all corporate meetings each shareholder, either in person or by proxy, shall be entitled to as many votes as he owns shares of stock, in the manner required by the Civil Code. Such proxy shall be in writing and filed with the secretary.

[fol. 1853]

ARTICLE XIII

INDEBTEDNESS

The board of directors shall have power to incur indebtedness, and the terms and amount thereof shall be entered in the minutes. The board of directors shall have the power to secure said indebtedness, or any obligation or obligations of the corporation, by pledge, mortgage, deed of trust, or other security given upon any property owned by it or in which it has any interest.

ARTICLE XIV

GENERAL MANAGER

The board of directors may, in its discretion, appoint a general manager who shall hold office at the pleasure of the board of directors. Any director or other person may be elected to serve as manager. The manager shall have such authority and shall perform such duties as may be directed by the board of directors.

ARTICLE XV

MISCELLANEOUS

1. *Meetings. Where Held.*

(a) Meetings of the shareholders may be held at the principal office for the transaction of the business of the corporation, or at such other place within the State of California as may hereafter at any time be designated either in its articles of incorporation or by-laws.

(b) Meetings of the board of directors of the corporation, both regular and special, may be held at any place within or without the State of California, as may be from time to time fixed by a quorum thereof, provided, however, that until otherwise so fixed such meetings shall be held at the principal office for the transaction of the business of the corporation.

2. *Notice. When Conclusive.*

An entry made in the minutes of the directors of shareholders, pursuant to resolution or recital, that the notice required by these by-laws, or by law, to be given of such meeting has been given, shall be conclusive upon the corporation, its directors, shareholders, and all other persons, that such notice has been duly given, in proper form and substance, to the proper persons, and for the requisite length of time.

3. *Repeal of Former By-Laws.*

This new code of by-laws is in lieu of all other by-laws and amendments thereto of the corporation.

[fol. 1854]

ARTICLE XVI

SEAL

The board of directors shall provide a suitable seal containing the name of the corporation, the year of its creation, and other appropriate words, and may alter the same at pleasure.

ARTICLE XVII

AMENDMENTS

These by-laws may be repealed or amended, or new by-laws may be adopted, at the annual meeting, or at any other meeting of the shareholders called for that purpose, by the directors, by a vote representing two-thirds of the subscribed shares. The written assent of the holders of two-thirds of the shares is effectual to repeal or amend any by-law, or to adopt additional by-laws.

ARTICLE XVIII

EXECUTIVE COMMITTEE

The board of directors of this corporation may provide for the appointment of an executive committee, determine the number of its members, and its tenure of office, and

may delegate to such committee any of the powers and authority of the board, except the power to declare dividends and to make any changes in the by-laws. Such committee shall be composed of members of the board and shall act only in the intervals between meetings of the board, and shall be subject at all times to the control of the board of directors.

[fol. 1854a]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

Honorable Harry C. Westover, Judge Presiding

No. 333-58 HW Civil

CASE-SWAYNE CO., INC., a corporation, Plaintiff,

vs.

SUNKIST GROWERS, INC., Defendant.

Transcript of Proceedings—November 25, 1964

Los Angeles, California

* * * * * * *

[fol. 1854b] Mr. Beardsley: Mr. Henderson, you have marked as Exhibit 1-A, I believe, the amended Articles of Incorporation and By-Laws of Sunkist Growers, Inc. Have you any objection to those going in evidence? That is your Exhibit 1-A?

Mr. Henderson: Well, if you will offer them, I will not object.

Mr. Beardsley: I offer them.

The Court: They may be received in evidence.

The Clerk: Plaintiff's 1-A admitted in evidence.

* * * * * * *

[fol. 1854c]

Case No. 333-58-HW

CASE-SWAYNE CO., INC.

vs.

SUNKIST GROWERS, INC.

PLAINTIFF'S EXHIBIT 1A

Date Nov 9 1964 No. 1A Identification

Date Nov 25 1964 No. 1A In Evidence

Clerk, U. S. District Court, So. Dist. Calif.
J. Dean, Deputy Clerk

AMENDED ARTICLES OF INCORPORATION AND BY-LAWS

SUNKIST GROWERS, INC.

[fol. 1854d] —INDEX—

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AMENDED ARTICLES OF INCORPORATION

SUNKIST GROWERS, INC.

FIRST: The name of this corporation (hereinafter referred to as "Sunkist") is:

SUNKIST GROWERS, INC.

SECOND: The primary purpose for which Sunkist is formed is to furnish facilities and agencies through which citrus fruits of its members and other producers may be marketed or processed and marketed, and to return to said members or other producers the proceeds of sales, less necessary operating and marketing expenses, on the basis of the quantity or value of citrus fruits marketed for such member or other producer.

In carrying out said primary purpose, Sunkist shall have every power, privilege, right and immunity now or hereafter authorized or permitted by law to a corporation organized or existing pursuant to the provisions of Chapter 4 of Division 6 of the Agricultural Code of the State of California and amendments thereto and substitutions therefor and continuances thereof. Nothing herein contained

shall be deemed to limit the right or power of Sunkist to do any lawful act that the board of directors shall determine.

THIRD: Sunkist is organized and exists as a nonprofit cooperative marketing association, without capital stock, pursuant to the provisions of Chapter 4 of Division 6 of the Agricultural Code of the State of California.

FOURTH: The principal office for the transaction of business of Sunkist is located in the County of Los Angeles, State of California.

FIFTH: The number of directors shall be thirty-two (32); provided, that by-laws may be adopted whereby a different number of directors may be fixed, in which event the number of directors shall be as provided in said by-laws.

SIXTH: As stated in the original articles, the names and addresses of the persons who were to serve as the first directors were:

NAME	RESIDENCE
F. Q. Story	*Alhambra, California*
W. E. Sprott	*Porterville, California*
A. P. Harwood	*Upland, California*
H. E. Cheseboro	*Covina, California*
W. R. Powell	*Glendora, California*
P. J. Dreher	*Pomona, California*
S. J. Beals	*Orange, California*
W. G. Fraser	*Riverside, California*
A. P. Johnson	*Riverside, California*
Frank Scoville	*Corona, California*
E. F. Van Luven	*Colton, California*
W. H. Young	*Duarte, California*
D. Felsenthal	*Los Angeles, California*

—1—

[fol. 1854h] SEVENTH: To provide funds for corporate purposes of Sunkist, revolving funds and other allocated reserves may be established. Such revolving fund or allo-

cated reserve credits shall not be deemed to evidence, create or establish any present property rights or interests, as such terms are herein used, but such credits shall be deemed to evidence an indebtedness of Sunkist payable only as provided in the by-laws. In the event the membership of any member shall terminate for any reason whatsoever, such member shall not thereupon become entitled to demand or receive any interest in the property and assets of Sunkist as herein defined, but shall be entitled only to receive payment of its revolving fund credits and its interest, if any, in other allocated reserves as and when same would have been paid had it remained a member.

EIGHTH: Sunkist is a membership corporation, without shares of stock. It shall have two classes of members, as more particularly defined in the by-laws: (1) Local Associations and (2) District Exchanges. The voting power and property rights and interests of each said class shall be as follows:

1. *Voting Power*—The voting power of members shall be unequal. District Exchanges alone shall have the power to vote for directors. In the election of directors, each District Exchange shall be entitled to as many votes as the number of directors it is entitled to nominate, as prescribed by the by-laws, multiplied by the number of directors to be elected. District Exchanges shall have no other voting powers. Other than in the election of directors, all voting rights of members shall vest in Local Associations. Each Local Association shall be entitled to one (1) vote for each one thousand (1,000) cartons or equivalent (or major fraction thereof) of citrus fruit, fresh and products, marketed by such member through Sunkist as shown by Sunkist records during the average of the three (3) preceding completed fiscal years of Sunkist.

2. *Property Rights.* The property rights and interests of the members of Sunkist shall be unequal. The

District Exchanges as such shall have no property rights or interests. The property rights and interests in Sunkist of Local Associations at any time shall be such part of the entire property rights and interests as the amount of revolving fund credits standing upon the books of Sunkist in the name of such member at that time bears to the total of such credits on said books at such time.

In the event of dissolution or liquidation, any residue that may remain after payment in full of all indebtedness, including that evidenced by revolving fund credits and other allocated reserves, shall be distributed to those persons (other than former members who have been expelled) holding revolving fund credits at the time of commencement of proceedings for liquidation or dissolution, in proportion that the amount of revolving fund credits held by each of them at such time bears to the total amount of such credits.

In the event Sunkist shall at any time determine to transfer the property and assets of Sunkist to a successor association and shall designate such association as the successor association of Sunkist, then the transfer of said property and assets by Sunkist to such successor association shall not be considered a dissolution or liquidation within the meaning of the foregoing paragraph. Such association may be formed or exist under state or federal laws, provided only it shall be in substance a farmers' nonprofit cooperative marketing association. Such successor association may be an association formed or recognized for such purpose, or it may be formed by merger, consolidation, or any corporate reorganization. Property rights and interests of the members of Sunkist shall be recognized and preserved in an equitable manner in such successor association.

NINTH: Sunkist shall have perpetual existence.

[fol. 1854i]

AMENDED BY-LAWS
SUNKIST GROWERS, INC.

General

1.1 *Articles of Incorporation*—The articles of incorporation of Sunkist are hereby made a part of these by-laws and all matters hereinafter contained in these by-laws shall be subject to such provisions in regard thereto, if any, as are set forth in the articles of incorporation. All references in these by-laws to the articles of incorporation shall be construed to mean the articles of incorporation as from time to time amended. The name and purposes of the corporation shall be as set forth in the articles of incorporation.

1.2 *Definitions*—As used in these by-laws, the following terms have the following meanings:

(a) "Fresh fruit" means fruit destined only for fresh consumption and moving in normal fresh fruit channels. The board of directors may from time to time specify other and more detailed definitions not inconsistent herewith.

(b) "Products fruit" means all fruit other than that defined as fresh fruit.

(c) "Fruit" or "citrus fruit" means both fresh and products fruit of all varieties.

(d) "Variety" means any one of the following: Navel oranges, Valencia oranges, Miscellaneous oranges (including tangerines), lemons, grapefruit or limes.

(e) "Carton" means the quantity of the particular fruit involved which is contained in the standard carton in common use for fresh shipments of such fruit, or the equivalent thereof, as determined from time

to time by the board of directors. The board may from time to time establish the relationship or ratio between the carton and other units of weight or quantity.

(f) "Market" or "marketing" means the sale or shipment for purposes of sale as fresh fruit or as products fruit, utilization for products, or other disposition.

(g) "Volume marketed through Sunkist as shown by its records" means the volume, in terms of one thousand (1,000) cartons or equivalent (or major fraction thereof), of the particular fruit involved, marketed by a Local Association or a District Exchange through Sunkist during the average of the three (3) preceding completed fiscal years, on which assessments or deductions for revolving funds and Sunkist charges and expenses have been collected. As soon after the close of a fiscal year as such volume records can be compiled, the average volume of the three (3) preceding completed fiscal years shall be reported to the board of directors and, when approved or accepted by the board, shall be the basis for determination of volume whenever pertinent under these by-laws. Any fruit exempted from the requirement of delivery as provided in By-law No. 9.3 (b) shall not be included in volume as herein defined. In determining such average volume, appropriate adjustments may be made, in such manner as determined by the board of directors upon evidence satisfactory to it, in the case of mergers, consolidations or transfers of growers from a dissolving Local Association and in the case of Local Associations which have marketed through Sunkist for less than three (3) years.

MEMBERSHIP

2.1 *General Organization*—Throughout California and Arizona since the 1880's citrus growers have formed them-

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[fol. 1854j] selves into cooperatives or have constructed their own facilities to pick, pack and market their fruit in fresh or products form. These local packing house organizations have been known and will in these by-laws be referred to as "Local Associations." The Local Associations created regional marketing agencies in common generally known, and in these by-laws referred to, as "District Exchanges." Sunkist was, in turn, formed by the Local Associations and their District Exchanges in order to furnish additional facilities and agencies in maintaining, extending and making more efficient the marketing of the growers' citrus fruit. Sunkist and its member District Exchanges and Local Associations constitute the cooperative marketing system sometimes referred to as the "Sunkist System."

The fundamental purpose of the Sunkist System is to market the growers' citrus fruit in the form received, or in manufactured or other form at the highest return to such growers consistent with their long term interests. In carrying out such purpose, Sunkist shall act as a nonprofit cooperative marketing association. Sunkist may, at the discretion of the board of directors, also market, in the form received or in manufactured or other form, the fruit or products thereof, of nonmembers who are producers, or of any association of such producers, insofar as the same may be done in compliance with federal and state laws and regulations applicable to farmers' marketing cooperatives; but such nonmember business shall not exceed fifty per cent (50%) by value of the total marketing business and shall be handled on the same basis as that transacted for members.

2.2 *Classes of Members*—There shall be two classes of members:

(a) "Local Associations," which shall be persons engaged in the production of citrus fruits or associations of such producers. Such persons or associations must also be members of, or affiliated with, a District Exchange; and

(b) "District Exchanges," each of which shall be a marketing agent in common of its Local Associations.

2.3 *Agreements of Local Associations With Growers*—Each Local Association shall maintain appropriate agreements between itself and its growers which will provide for the delivery to such Local Association of all the fruit covered by such agreements. Each Local Association shall furnish, upon request, to Sunkist and/or to the District Exchange with which it is affiliated, a list of growers then affiliated with said Local Association and a copy of its agreement with growers.

No Local Association shall release any of its growers from such grower agreement (except upon termination of the same by giving of appropriate notice of termination under the terms of said agreement during the regular withdrawal period) without giving to Sunkist and to the District Exchange with which such Local Association is affiliated ten days' notice of such proposed release. At any time within the varietal season that such releases individually or collectively shall total more than five per cent (5%) of the volume of the Local Association by variety, any releases in excess of such percentage must be approved by the District Exchange with which said Local Association is affiliated.

2.4 *Representative of Member*—If any member is other than a natural person, such member may be represented by any individual, associate, officer or manager or member

thereof, duly authorized in a writing filed with the secretary of Sunkist.

2.5 *Membership Contract*—Persons qualified under By-law No. 2.2 may become member of Sunkist by submitting an application for membership, in a form prescribed by the board of directors. When accepted by Sunkist, such application shall constitute a contract between the member and Sunkist, and between the Local Association and the District Exchange with which such Local Association may be affiliated, or between the District Exchange and all Local Associations affiliated with it, for the benefit of all such

[fol. 1854k] parties, and for the benefit of each and every other member of Sunkist. The board of directors shall have the right, in its sole discretion, to refuse to accept such application for membership.

2.6 *Nontransferability of Membership*—No membership shall be assigned or transferred either voluntarily or involuntarily or by operation of law, nor shall any membership or membership rights of a member be assigned, transferred, alienated or encumbered in any manner or by any means whatsoever; provided, however, that nothing herein contained shall be deemed to impair the transferability of revolving fund credits as hereinafter provided in By-law No. 10.8.

2.7 *Termination of Membership*—Any membership in Sunkist shall be terminated upon occurrence of any of the following events:

(a) If the member ceases to be a producer or cooperative association of producers or marketing agent in common of such producers or associations within the meaning of applicable federal and state laws and regulations; or

(b) By death, disbanding or dissolution of the member; or

(c) By notice of termination as provided in the membership contract; or

(d) By expulsion as provided in By-law No. 2.8.

2.8 *Expulsion*—Any member may be expelled by a majority vote of the authorized number of the board of directors for failure to comply with the by-laws or rules and regulations issued thereunder, or by a two-thirds (⅔) vote of the authorized number of directors if termination of such membership is judged to be in the best interests of other members. Before vote upon a proposal to expel any member, such member shall be given notice and a fair and reasonable opportunity to be heard at a regular or special meeting of the board. Any action of the board hereunder shall be final and conclusive. Upon expulsion, all voting and property rights of the member so expelled shall cease and terminate except that such member shall be entitled to receive payment of any outstanding revolving fund or other allocated reserve credits (less any indebtedness to Sunkist) to be paid in the manner and at the time such payment would have been paid had such membership been continued.

Voting Rights

3.1 *Local Associations*—Local Associations shall be entitled to vote upon all questions requiring membership action except the election of directors. All such voting by Local Associations shall be based on volume and each Local Association shall be entitled to one (1) vote for each one thousand (1,000) cartons or equivalent (or major fraction thereof) of the volume of citrus fruit, fresh and products, marketed by such member through Sunkist during the average of the three (3) preceding completed fiscal years of Sunkist, as shown by its records, as provided in By-law No. 1.2 (g). A majority of the total votes cast shall be necessary for any action by members to be effective, except as otherwise provided in By-laws No. 3.2, 4.4, 4.8, 9.4

(b), (d), and (f), and 11.7 (a). In the event any question requiring concurrence of directors representing a specified percentage of volume for board action is submitted to a vote of members, a majority vote thereon to be effective must include the votes of members representing a like percentage.

3.2 *Varietal Voting*—It is recognized that certain questions may from time to time arise relating solely to the promotion of a particular variety of fruit and the assessment relating thereto. To the extent that such questions, as herein more particularly specified, are referred to the members for vote under this by-law, either at a meeting of members or by mail, the following provisions shall apply:

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[fol. 1854 1] (a) *Procedure*—At the request of Local Associations representing one-fifth (1/5) of the voting power of a particular variety or at the request of one-third (1/3) of the authorized number of directors, any question subject to varietal voting shall be submitted to a vote of Local Associations on a varietal basis. The affirmative vote of three-fourths (3/4) of the voting power represented by such variety shall be binding upon all members insofar as it concerns the promotion of the variety involved and the assessment relating thereto.

(b) *Varietal Questions*—Voting by Local Associations shall be on a varietal basis on any question relating to the appropriation or use of funds for advertising, promotion or research to be raised solely by assessing a single variety but nothing herein contained shall be construed to authorize varietal voting on assessments resulting from an allocation between varieties of the general cost of maintaining any department or facility of Sunkist for the use of more than one variety.

3.3 *District Exchanges*—District Exchanges shall have the exclusive power to nominate and elect directors but shall have no other voting rights. Each District Exchange shall nominate only as many directors as it shall be entitled to under By-laws No. 5.2. Each District Exchange shall be entitled to cast votes for election of directors in accordance with the following formula: The number of directors which it is entitled to nominate under By-law No. 5.2 multiplied by the number of directors to be elected.

3.4 *Proxies*—Any member, or its duly authorized representative appointed under By-law No. 2.4, entitled to vote at a membership meeting or execute consent shall have the right to do so either in person or by proxy, which proxy shall be in writing executed by the member or its duly designated representative and filed with the secretary of Sunkist. No proxy shall be valid after the expiration of eleven (11) months from its date, unless it specifies the length of time it shall continue in force, which shall in no event be for more than three (3) years.

3.5 *Voting by Mail*—Whenever so authorized by these by-laws or by the board of directors, a membership vote of Local Associations may be conducted by mail, without the necessity of a meeting. To be effective, the total vote cast by mail on any question shall be not less than the number required to constitute a quorum had such vote been taken at a meeting of members.

Meetings of Members

4.1 *Place of Meetings*—All meetings of members shall be held at the principal office of Sunkist or at such other place in the County of Los Angeles as may be designated by the board of directors.

4.2 *Regular Annual Meeting*—A regular annual meeting of all Sunkist members shall be held at 10 o'clock a.m. on the third Wednesday in December of each year. At such meeting directors shall be elected, reports of the affairs of

Sunkist shall be considered and any business may be transacted which is within the power of the members.

4.3 *Notice of Regular Annual Meeting*—Ten days' notice of each regular meeting of the members shall be given as provided in By-law No. 11.2. Such notice shall state the place, the day and the hour of the meeting and that the purposes thereof are the election of directors and the transaction of such other business as may come before the meeting.

4.4 *Special Meetings*—Except in those instances where a particular manner of calling a meeting or obtaining a vote of members is prescribed by law or in these by-laws, a

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[fol. 1854m] special meeting of all members or of the members of either class may be called at any time by the President, or on demand of one-third (1/3) of the directors, or by members entitled to exercise one-fifth (1/5) of the voting power. No business shall be transacted at a special meeting other than such as is included in the purposes stated in the notice.

4.5 *Notice of Special Meeting*—Notice of each special meeting shall be given in the same manner as for annual meetings. Notice of any special meeting shall specify the purposes of the meeting, in addition to the place, the day and the hour of such meeting.

4.6 *Adjournment and Notice*—Any members' meeting, whether or not a quorum is present, may be adjourned from time to time by a vote of the majority of the voting power of the members present in person or by proxy, but in the event there is not a quorum initially present at any members' meeting, no other business may be transacted. When any meeting of members is adjourned for thirty (30) days or more, notice of the adjourned meeting shall be given as in the case of an original meeting. Otherwise, it shall not be necessary to give any notice of adjournment other than by announcement at the meeting at

which adjournment is taken nor shall it be necessary to give any notice of the business to be transacted at an adjourned meeting.

4.7 *Quorum*—At any meeting of all members, or of any class of members, the presence in person or by proxy of persons entitled to vote a majority of the voting power entitled to vote at such meeting shall constitute a quorum for the transaction of business, except as otherwise may be required by law. The members present at a duly called and held meeting at which a quorum is present may continue to do business until adjournment, notwithstanding the withdrawal of enough members to leave less than a quorum.

4.8 *Consent of Absentees*—The transactions of any meeting of members, either regular or special, however called and noticed, shall be as valid as though had at a meeting duly held upon regular call and notice, if a quorum be present either in person or by proxy, and if, either before or after the meeting, each of the members entitled to vote, not present in person or by proxy, signs a written waiver of notice, or a consent to the holding of such meeting, or an approval of the minutes thereof. All such waivers, consents or approvals shall be filed with the corporate records or made a part of the minutes of the meeting.

Directors.

5.1 *Number and Qualification*—The authorized number of directors of Sunkist shall not be less than thirty (30) nor more than thirty-three (33). Until changed by the board of directors within the foregoing limits, the authorized number of directors shall be thirty-two (32). A director shall be either a citrus producer who markets fruit through Sunkist, or the duly authorized representative of such a producer.

5.2 *Selection of Directors*—Each District Exchange shall be entitled to nominate one (1) director. Additional di-

rectors may be nominated by District Exchanges, on the basis of the volume of all fruit marketed through Sunkist as shown by its records for the average of the three (3) preceding fiscal years, as provided in By-law No. 1.2 (g), in accordance with the following formula:

Each District Exchange having a percentage of such volume above three and six-tenths per cent (3.6%) and less than nine and six-tenths per cent (9.6%)—one (1) additional director;

Each District Exchange whose percentage of such volume is nine and six-tenths per cent (9.6%) or more but less than fifteen and six-tenths per cent (15.6%)—two (2) additional directors;

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[fol. 1854n] Each District Exchange whose percentage of such volume is fifteen and six-tenths per cent (15.6%) or more but less than twenty-one and six-tenths per cent (21.6%)—three (3) additional directors; and

Each District Exchange whose percentage of such volume is twenty-one and six-tenths per cent (21.6%) or more—four (4) additional directors.

5.3 *Election and Term of Office*—The directors shall be elected annually by District Exchange members at the time of the regular annual meeting of the members, but if any such annual meeting is not held, or the directors are not elected thereat, the directors may be elected at any special meeting of District Exchange members held for that purpose. Any director shall hold office until his successor is elected.

5.4 *Vacancies*—Vacancies in the board of directors shall be filled by the other directors in office upon nomination and certification by the appropriate District Exchange; and such person shall hold office until his successor is elected.

5.5 *Place of Meetings*—Meetings of the board of directors shall be held at the principal office of Sunkist, or at any other place within or without the State of California which has been designated by the board or by written consent of all members of the board.

5.6 *Organization Meeting*—Immediately after each annual election of directors, the newly elected directors shall hold a regular meeting for the purpose of organization, election of officers, and the transaction of other business. Notice of such meeting is hereby dispensed with.

5.63 *Regular Meetings*—In addition to the regular organization meeting, a regular meeting of the board of directors shall be held at 9:30 o'clock a.m. on the first and third Wednesdays of each month.

5.65 *Special Meetings*—A special meeting of the board of directors shall be held whenever called by the president, or by any vice-president in the absence of the president, or by one-third (⅓) of the directors. Any and all business may be transacted at a special meeting.

5.7 *Notice of Meetings of Directors*—No notice of regular meetings of the directors need be given. Notice of each special meeting shall be given pursuant to By-law No. 11.2, showing the time and place, at least two (2) days prior to the time of such meeting.

5.75 *Adjournment*—Notice of time and place of holding an adjourned meeting need not be given to absent directors, if the time and place be fixed at the meeting adjourned and the adjournment is for a period of not more than seven (7) days.

5.8 *Waiver of Notice*—The transactions of any meeting of the board of directors however called and noticed or wherever held, shall be as valid as though had at a meeting duly held, after regular call and notice, if a quorum be present, and if, either before or after the meeting, each of the directors not present signs a written waiver of notice,

a consent to holding such meeting, or an approval of the minutes thereof. All such waivers, consents or approvals shall be filed with the corporate records or made a part of the minutes of the meeting.

5.85 *Quorum*—A majority of the authorized number of directors shall be necessary to constitute a quorum for the transaction of business. However, in the absence of a quorum of directors who have been previously regularly seated, a quorum for the purpose of accepting resignations of directors and filling such vacancies shall be one-third (⅓) the authorized number of directors.

5.9 *Fees and Expenses*—Directors shall not receive any stated salary for their services as directors, but by resolution of the board, a fixed fee plus expenses may be paid for attendance at any meeting of the board or at any committee meeting.

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POWERS OF DIRECTORS

6.1 *General Powers*—Subject to the limitations of the articles of incorporation, of the by-laws and of the statutes of the State of California relating to action which shall be authorized or approved by members, all corporate powers shall be exercised by or under the authority of, and the business and affairs of Sunkist shall be controlled by, the board of directors. Without prejudice to such general powers, but subject to the same limitations, it is expressly declared that the board of directors shall have the following powers, to wit:

(a) To appoint and remove, at pleasure, all officers, agents and employees of Sunkist, prescribe their duties, fix their compensation, and require from them, if deemed advisable, security for faithful service.

(b) To conduct, manage and control the affairs and business of Sunkist and to make rules and regula-

tions not inconsistent with the laws of the State of California, the articles of incorporation or by-laws, for the guidance of its officers and the management of its affairs.

(c) To borrow money and incur indebtedness for the purposes of Sunkist, and to cause to be executed and delivered therefor, in the corporate name, promissory notes, bonds, debentures, deeds of trust, mortgages, pledges, hypothecations and other evidences of indebtedness and securities therefor, and to do every act and thing necessary to effectuate the same.

(d) To establish grades for fruit and for products with rules and regulations pertaining thereto, and to prescribe the standards of quality of fruit and products to be marketed under such grades, and permit Local Associations and District Exchanges to pack or deliver their fruit under such grades upon compliance with such prescribed standards and with all rules and regulations established pursuant hereto.

(e) To prescribe rules and regulations in connection with the use of any trademarks, trade names, brands, patents or copyrights owned or controlled by Sunkist and any such rules or regulations may be changed from time to time.

6.2 *Charges and Expenses*

(a) *Of Sunkist*—All charges and expenses of Sunkist, including deductions for such reasonable reserves as may from time to time be prescribed by the board of directors and including a subscription to "The California Citrograph," shall be met by assessments or deductions upon District Exchanges or Local Associations. The method, amount, manner and time of assessment or deduction shall be fixed and determined from time to time by the board of directors. Each District Exchange or Local Association shall

pay to Sunkist when due the amount of any assessments or deductions hereunder.

(b) *Of District Exchanges*—All charges and expenses of District Exchanges, including Sunkist assessments and deductions for such reasonable reserves as may from time to time be prescribed by their respective boards of directors, shall be met by assessments or deductions upon Local Associations. The method, amount, manner and time of assessment or deduction shall be fixed and determined from time to time by the board of directors of each District Exchange. Each Local Association shall pay to the District Exchange with which it is affiliated when due the amount of any assessments hereunder and authorizes Sunkist or District Exchange to deduct from the proceeds of sale of fruit or products marketed for it the amount of any such assessment and any other amounts due District Exchange or Sunkist from such Local Association.

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[fol. 1854p] (c) *Refunds*—Any amount by which the marketing or other assessments or deductions hereunder exceed the actual cost (including in such cost any reserves prescribed as provided in these by-laws) shall be refunded to the persons from whom collected as promptly as accounting procedure permits.

(d) *Set-off*—Any amount due Sunkist from any member or patron as an assessment, deduction or otherwise may be set off against any amount which Sunkist is or may become obligated to pay such person.

COMMITTEES OF THE BOARD

7.1 *Products Executive Committee*—A Products Executive Committee is hereby established. It shall be composed of fifteen (15) directors but in no event to exceed one-half (½) of the authorized number of directors.

There are hereby delegated to said Products Executive Committee all of the functions and powers of the board relating to or directly affecting products operations, including products sales, subject to the direction and control of the board. It is the purpose of these by-laws to afford substantial autonomy to said committee in the operation of the products portion of Sunkist business.

7.2 *Other Committees of the Board*—Other committees may be established by resolution of the board specifying the number of members and prescribing the committee functions and duties. Such other committees may include individuals who are not members of the board.

Officers and Management

8.1 *Corporate Officers*—The officers of Sunkist shall be elected by the board of directors and shall be a president, one (1) or more vice-presidents, a secretary and a treasurer. The board may also appoint one (1) or more assistant secretaries or assistant treasurers and any other corporate officers which the board of directors may see fit in its discretion to designate. The president and vice-president or vice-presidents shall be elected by the directors from their number. One (1) person may hold two (2) or more offices except that the offices of president and secretary or any vice-president and secretary may not be held by the same person.

8.2 *Election and Term of Office*—Officers shall be elected annually at the organization meeting of the board of directors following the annual meeting of members, or at such other time as the board of directors shall determine. Unless sooner removed by the board of directors, or unless they resign or become disqualified, all officers shall hold office until their successors are chosen and have qualified. Any officer, whether elected or appointed by the board of directors, may be removed at any time by a majority vote of the authorized number of directors.

8.3 *Powers and Duties*—Subject at all times to the control and direction of the board of directors, each officer shall have and exercise the powers and duties usual to his office.

8.4 *Management*—The board of directors shall also elect a general manager who shall have administrative authority over all personnel in the employ of Sunkist. Upon the recommendation of the general manager, the board shall also appoint an assistant general manager and may appoint such other assistants or department heads as the management and the board deem necessary or advisable to properly carry on the business of Sunkist. Their duties, responsibilities, and authorities shall be prescribed by the general manager. Any person elected or appointed under this by-law is subject to removal at any time by a majority vote of the authorized number of directors.

[fol. 1854q]

MARKETING

9.1 *Marketing Obligation*—Each Local Association shall market all of the fresh fruit subject to its control through the District Exchange with which it is affiliated. Each District Exchange shall market through Sunkist all of the fruit subject to its control. Each Local Association shall deliver to Sunkist all of the products fruit subject to its control. Sunkist shall market all of said fruit both fresh and products and shall determine the methods of marketing to be adopted in any or all markets and the types of containers and methods of packaging to be used.

9.2 *Marketing Agency Created*—Each Local Association and District Exchange designates and appoints Sunkist as its agent and the agent of its growers in all matters concerning the marketing of its fresh fruit, and the processing and marketing of its products fruit. Full power and authority are conferred upon Sunkist as such agent to conduct its marketing activities in such manner as it, in its sole discretion, determines to be for the best interests of

all of its members. As such agent, Sunkist may inspect any records pertaining to the disposition of fruit maintained by or for any member, including any or all records maintained by any federal or state marketing committee or board pertaining to such member.

9.3 *General Marketing Plan*—In carrying out the basic purpose of marketing the growers' citrus fruit at the highest return to the growers, the Sunkist System has adopted the following general marketing plan:

(a) *Fresh Fruit*—Sunkist shall develop and determine the market opportunities for each variety of citrus fruit to be marketed by its members. Sales shall be made through the facilities and agencies furnished by Sunkist.

(b) *Products Fruit*—Products fruit shall be delivered to Sunkist by each Local Association, f.o.b. the packing house. Thereafter Sunkist shall market such products fruit either in the form received or in manufactured form. Products grapefruit from Local Associations located in Arizona and products oranges from Local Associations located in the Yuma area of Arizona are excepted from the requirements of delivery to Sunkist.

9.4 *Regulations Relating to Marketing Fresh Fruit*—The following provisions relate and are applicable with regard to the marketing of fresh fruit by Sunkist:

(a) *Reserved Rights*—Except as provided in By-law No. 9.4. (f), each Local Association reserves to itself the right to determine to what markets it shall ship, where its fruit shall be sold, and, except at auction points, the price it is willing to receive.

Each Local Association hereby delegates said reserved right to the District Exchange with which it is affiliated; provided, however, that any Local Association may at any time and from time to time

terminate such delegation and itself exercise said reserved right for such period of time as it may deem proper, or redelegate said reserved right to such District Exchange.

(b) *Quotas and Allocation*—Sunkist may, by a majority vote of the authorized number of directors determine the maximum amount of fresh fruit to be marketed currently and allocate the opportunity to ship equitably among Local Associations; provided, however, that said majority includes directors representing eighty-five per cent (85%) of the volume marketed through Sunkist, as shown by its records, of the variety (both fresh and products) under consideration. Such allocation shall be binding upon District Exchanges and Local Associations.

(c) *Contact with Buyers*—District Exchanges and Local Associations shall not solicit business from the trade or employ any solicitor or agent, or correspond with

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[fol. 1854r] any buyer for the purpose of promoting the sale of their fresh fruit. All prices, quotations and allowances shall be issued and distributed solely by Sunkist. Copies of correspondence with district managers in the markets by any District Exchange must be sent to Sunkist; and by any Local Association to Sunkist and to the District Exchange with which it is affiliated. District Exchanges shall be entitled to receive, upon request, copies of Sunkist correspondence relating to their fruit.

(d) *Transportation*

(1) *Routing*—Sunkist shall have authority to specify the route of all shipments of fresh fruit. Any Local Association may at any time and from time to time terminate such authority as to it

or again give Sunkist such authority. Sunkist shall be notified immediately in writing through the District Exchange with which such Local Association is affiliated of any such termination of such authority, and unless so notified Sunkist may exercise the same.

(2) *Facility*—Sunkist may, by a majority vote of the authorized number of directors, which majority shall include directors representing seventy-five per cent (75%) of the volume marketed through Sunkist, as shown by its records, of the variety (both fresh and products) under consideration, determine the transportation facility—whether by rail, by water or otherwise.

(3) *Pooling of Charges*—Transportation costs, including but not restricted to costs of refrigeration and other protective services, incurred in connection with the movement of fresh fruit destined for points outside the state of origin, may in the manner and to the extent determined by a majority vote of the authorized number of directors, which majority shall include directors representing seventy-five per cent (75%) of the volume marketed through Sunkist, as shown by its records, of the variety (both fresh and products) under consideration, be pooled equitably in relation to the different types of refrigeration and other protective services and paid by charges or assessments levied and apportioned as the board of directors may determine.

(e) *Losses and Customer Claims*—The only losses for which Sunkist shall be responsible to District Exchanges or Local Associations are losses arising from the financial failure or default of purchasers after having positively accepted the fruit, which default is not due to complaint of the buyer concerning the quality, condition or grade of the fruit. Such losses

shall be charged as a part of the general marketing expense and paid in the method, amount and manner determined by the board of directors. In case of any controversies with customers wherein, in the judgment of the board of directors, the collective interest of members is involved, the judgment of said board as to settlement of such dispute shall be final and binding upon the Local Association which furnished the fruit.

(f) *Pooling*—Pools for fresh fruit may be established by the board of directors on a varietal basis and may include fruit produced in or destined for any particular geographical section, or fruit conforming or not conforming to specified standards of quality and/or size or fruit for Government use. Each Local Association shall have the right to determine whether or not it will provide fruit for each such pool. Sales of fruit eligible for any such pool shall not be made in competition with pool fruit. The rights reserved under By-law No. 9.4 (a) shall be limited to the extent provided in this By-law No. 9.4 (f). Any pool so established shall be pursuant to a pooling plan to be prescribed by the board of directors. Such plan shall specify the conditions of eligibility

[fol. 1854s] of fruit, the methods of operation and all rules and regulations in connection therewith, which shall include provision for equitable allocation of the marketing opportunity among those desiring to participate. Such pools may be established only by a majority vote of the authorized number of directors, which majority must include directors representing seventy-five per cent (75%) of the volume marketed through Sunkist, as shown by its records, of the variety or varieties (both fresh and products) in the producing area under consideration.

(g) *Obligation to Distribute Proceeds*—All proceeds of sales of fresh fruit, after deduction of freight and other charges directly allocable, and after any deductions authorized pursuant to By-law No. 6.2, shall be remitted to the appropriate District Exchanges and by them to the appropriate Local Associations as rapidly as collection and accounting procedures permit.

9.5 *Regulations Relating to Marketing Products Fruit*—The following provisions relate and are applicable with regard to the marketing of products fruit by Sunkist:

(a) *Power and Control of Sunkist in Handling Products Fruit*—Sunkist may sell and market the products fruit of its members and other producers or the products produced therefrom, pledge or otherwise hypothecate the same or any part thereof, transfer title thereto, and collect and receipt for the proceeds in its own name exclusively, or in the name of any subagent. No member by virtue of having furnished any fruit shall exercise any control over Sunkist with regard to either the processing or marketing of said fruit, or the conduct of the business of Sunkist, in all of which matters Sunkist may, in good faith, use its own discretion and judgment, free from any direction by such member. The member shall not be directly liable under any rules of agency on account of any contract, or contracts, made by Sunkist in carrying on its business of marketing products fruit.

(b) *Pooling*—Sunkist shall establish pools for the handling, processing and marketing of all products fruit. Each products fruit pool shall include such varieties or portions thereof as Sunkist may determine. Any pool so established shall be pursuant to a pooling plan to be prescribed by the board of directors.

(c) *Delivery of Fruit and Freight Regulation*—Sunkist may establish, maintain, and enforce an inspection

for quality, and reject such products fruit as is not acceptable for products purposes, and may charge back freight thereon to the shipper. Sunkist shall govern the collecting and assembling of products fruit for shipment to Sunkist and may prorate shipments if supply exceeds capacity of available facilities. Sunkist shall provide for the equitable handling of freight charges on products fruit in order that no shipper may be at a disadvantage by reason of his location with reference to the location of the processing facilities of Sunkist.

(d) *Obligation to Return Net Proceeds*—All proceeds of sales, less necessary operating and marketing expenses, shall be returned to the persons entitled thereto on the basis of the quantity or value of products fruit furnished. Such proceeds shall be so returned as promptly as the collection thereof, the financial position of Sunkist and accounting procedure may permit; provided, however, that any amounts assessed or deducted on the basis of the quantity or value of fruit furnished as additions to reserves (other than so-called valuation reserves, such as reserves for depreciation, bad debts, etc., which in accordance with recognized accounting practices are deductions under Section 23 of the Internal Revenue Code of 1939) in any fiscal year shall be apportioned on the books of Sunkist, to the persons contributing thereto and an appropriate certificate

[fol. 1854t] or notice of such assessment or deduction (including the dollar amount thereof) shall be issued and delivered to each such person within the period specified by law following the close of each fiscal year.

9.6 *Power Conferred by Statutes*—Sunkist shall have and in its discretion may exercise on an equitable basis on behalf of District Exchanges and Local Associations any and all powers relating to the marketing of fruit and products that Sunkist, District Exchanges and Local Associations are or may be hereafter authorized by state or federal statutes or by order or regulations based thereon to exercise. Any Local Association or District Exchange may, as to it at any time and from time to time, terminate the authority conferred upon Sunkist by this by-law or again give such authority to Sunkist. Sunkist shall be notified immediately in writing of any such termination of said authority, and unless so notified, Sunkist may exercise any of the powers referred to in this by-law.

9.7 *Warranty*—Each Local Association and each District Exchange warrants to Sunkist that it has the right to receive, pack and deliver for marketing and to market through Sunkist all of the fruit which it may deliver. Each of said members further warrants that said fruit and the disposition thereof shall comply with all state and federal statutes and regulations applicable thereto.

9.8 *Liquidated Damages for Member's Breach*—In the event that any member shall sell, market or dispose of any of the fruit that is to be marketed by or through Sunkist under the provisions of these by-laws other than through the agency of Sunkist, such act will injure Sunkist and its members in an amount that is, and will be, impractical and extremely difficult to determine and fix. The said damages are, therefore, fixed at fifty cents (50¢) per carton on all fresh fruit and fifty dollars ($50) per ton for all products fruit that is sold, marketed or disposed of contrary to the provisions of these by-laws. The member so violating the by-laws agrees to pay, and shall pay, said amount to Sunkist as liquidated damages, and in default of payment thereof to Sunkist upon demand, the same may be recovered in an action in any court of competent jurisdiction in the name of Sunkist, in which case Sunkist shall recover from

the member in addition to said liquidated damages, all costs, premiums for bonds, expenses and fees, including attorneys fees, in such action.

Revolving Fund

10.1 *Revolving Fund Created*—A fund, to be known as the "Sunkist Revolving Fund," is hereby created for the purpose of furnishing an equitable basis, in accordance with established cooperative practice, for acquiring capital to operate the business of Sunkist with contributions related to the use of facilities provided and to shipments of citrus fruit by the members and other patrons. Such revolving fund is a continuation and consolidation of the three revolving funds (A, B and C), heretofore maintained by Sunkist, and the revolving fund heretofore maintained by Exchange Lemon Products Company.

10.2 *Outstanding Credits*—Such revolving fund shall initially consist of the credits and priorities outstanding, as of the beginning of the 1958-59 fiscal year, in said previously existing funds, as shown by the books and records of Sunkist and Exchange Lemon Products Company. All such credits and priorities presently allocated to District Exchanges shall be reallocated to the appropriate Local Associations and accounts hereafter shall be kept with the Local Associations with copies to the appropriate District Exchanges.

10.3 *Revolving Fund Rates*—Additions to said revolving fund shall be made by assessments or deductions, as determined by the board of directors from time to time, on fruit marketed by or through Sunkist at the following rates:

(a) *Lemons*—Two cents (2¢) on each carton or equivalent of all lemons shipped in fresh fruit channels and an amount to be determined by the board of directors from time to time on the basis of quantity

[fol. 1854u] or value of products lemons, subject to a maximum of five dollars ($5.00) per net ton.

(b) *Oranges and Grapefruit*—One cent (1¢) on each carton or equivalent of all oranges and grapefruit shipped in fresh fruit channels and fifty cents (50¢) per net ton on products oranges and grapefruit, subject to a maximum of one cent (1¢) per carton or equivalent on all such fruit, fresh or products; and an amount to be determined by the board of directors, from time to time, as a percentage of the net sales value of orange and grapefruit products, subject to a maximum of seven and one-half per cent (7½%). "Net sales value" as used herein means the amount (not reduced by the amount of this assessment) determined from estimated final values established by the board of directors for each pool for products oranges and grapefruit.

Subject to the maximum rates specified, the board of directors may change the foregoing rates from time to time, but the maximum rates may be changed only by amendment of these by-laws. Fruit exempted, pursuant to By-law No. 9.3 (b) from the requirement of delivery to Sunkist shall be exempted from the foregoing assessments. Collections may be made through the District Exchanges but all credits shall be entered in the accounts of the respective Local Associations.

10.4 *Nature of Revolving Fund Credits*—All such revolving fund credits shall constitute indebtedness of Sunkist to the respective persons to whom credited, but such indebtedness shall be paid solely upon the conditions and at the time and times hereinafter provided. No interest shall be payable on any such credits. Such revolving fund credits shall be subordinated to all other indebtedness of Sunkist, secured or unsecured, as provided in By-law No. 10.95.

10.5 *No Segregation of Funds*—The monies deducted or assessed for the revolving fund may be commingled with

and used for corporate purposes as other monies belonging or coming to Sunkist are used. Nothing herein contained shall be deemed to require that any specific monies or funds be segregated, or designated, or marked, or set apart, or held for the revolving fund, nor shall the revolving fund be deemed a trust fund held for the owners of revolving fund credits.

10.6 *Losses Chargeable Against Credits*—In the event Sunkist sustains a substantial loss, from any cause whatever, the board of directors may, in its sole discretion, charge all or any part of said loss to any one or more of the following accounts:

(a) Current operating expenses;

(b) Revolving fund and/or other allocated reserve credits for the fiscal year in which such loss was incurred or to which the loss was attributable;

(c) All revolving fund and/or other allocated reserve credits for all years.

In the event said loss is charged to revolving fund or other allocated reserve credits, the same shall be charged ratably and proportionally against all credits in the varietal or other class charged. Notice of such charge against revolving fund or other allocated reserve credits shall be given within the period specified by law after the close of the fiscal year in which such loss is charged, to the persons in whose names the credits stand on the books of Sunkist. Anything in these by-laws to the contrary notwithstanding, there shall be payable in respect to revolving fund and other allocated reserve credits only the difference between the amount of the credit originally entered and the portion of such loss charged thereto.

The board of directors shall have the power to determine when a substantial loss has occurred, and its determination shall be conclusive. In making such determination, the

board may consider among other factors, losses from bank suspensions, uncollected accounts, fire, explosion, accident

[fol. 1854v] or other calamity, unforeseen marketing conditions, excessive or high manufacturing, operating or overhead costs due to crop failure or below normal production, inadequate depreciation charges, and unusual or unforeseen expenses, including taxes, assessments, fines, penalties and claims arising under any present or future law.

10.7 *Revolving Fund Statement*—Within the period specified by law after the close of each fiscal year, Sunkist shall furnish each patron of Sunkist during said fiscal year with a statement showing the dollar amount of revolving fund credits standing on the books of Sunkist in the name of such patron and the amount thereof which accrued during said fiscal year. In the event of a loss chargeable against revolving fund credits pursuant to By-law No. 10.6, the same shall be reflected on the revolving fund statement, which shall be furnished to all holders of revolving fund credits affected by such loss, whether or not they were patrons during said fiscal year.

10.8 *Assignment or Transfer*—Revolving fund credits may be assigned or transferred at any time by execution of a written assignment thereof, on a form to be provided by Sunkist, and delivery thereof to the secretary of Sunkist; provided, however, that no such transfer shall be complete until entered upon the books of Sunkist.

10.9 *Redemption*—When the aggregate of all outstanding unpaid credits of the revolving fund equals $17,000,000, or at such earlier time as the board of directors may determine, subsequent additions shall be used to revolve out or redeem the oldest unpaid revolving fund credits. All such credits from the same fiscal year shall have the same priority and if funds available are insufficient to pay all credits

for a given fiscal year, a pro rata payment may be made against all credits for that year or payment may be deferred until funds are available to pay in full all credits for such year.

10.95 *Payment on Dissolution*—In the event of dissolution or liquidation of Sunkist, all unpaid revolving fund and other allocated reserve credits shall be deemed due without regard to priority of revolution, but shall not be paid in any part until all other indebtedness of Sunkist has been paid or adequately provided for. In the event funds are insufficient to cover all such credits and reserves, payment of revolving fund and other allocated reserve credits shall be on a pro rata basis.

MISCELLANEOUS

11.1 *Principal Office*—The principal office for the transaction of business of Sunkist is hereby fixed and located at 707 West Fifth Street, Los Angeles, California.

11.2 *Method of Giving Notices*—Whenever in these bylaws notice is required to be given it may be given by one (1) or more of the following methods:

(a) Delivered personally; or

(b) Written notice either deposited in the mails postage prepaid or sent by telegraph, addressed to the residence or place of business of the member or director, as the same shall appear on the books of Sunkist.

11.3 *Effect of Holiday*—If the time designated herein for any meeting should fall upon a legal holiday, then any such meeting shall be cancelled unless another date is fixed by the board of directors and notice thereof given in the manner provided for a special meeting.

11.4 *Indemnity*—District Exchanges and Local Associations shall severally indemnify and save Sunkist harmless against all loss, damage, injury, liability, cost and/or ex-

pense of whatsoever nature suffered or to be suffered by Sunkist by reason of any claim or claims asserted or made to or against Sunkist by reason of any act of commission or omission of such member.

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[1854w] 11.5 *Fiscal Year*—The fiscal year of Sunkist extends from November 1 to October 31 following.

11.6 *Seal*—The board of directors shall provide a suitable seal containing the name of Sunkist, the date of its incorporation and other appropriate words, and may alter the same at pleasure.

11.7 *Amendments*—These by-laws may be amended or repealed or new by-laws adopted as follows:

(a) By vote or written assent of members entitled to exercise two-thirds (⅔) of the voting power, except that an amendment or repeal of the following by-laws shall require the greater percentages of such voting power, as follows:

By-law Number		Percentage Required
9.4(d) (2)	(Transportation—Facility)	75
9.4(d) (3)	(Transportation—Pooling of Charges)	75
9.4(f)	(Pooling)	75
7.1	(Products Executive Committee)	80
9.4(b)	(Quotas and Allocation)	85
9.4(a)	(Reserved Rights)	90
11.7	(Amendments)	90

or

(b) By vote of two-thirds (⅔) of the authorized number of directors: except that the board may not amend By-laws No. 3.1, 3.2, 3.3, or 3.5 (relating to voting

rights of members), 5.1 or 5.2 (relating to number, qualification and selection of directors) except that the board may amend By-law No. 5.1 solely for the purpose of establishing the exact authorized number of directors within the limits therein prescribed, such exact authorized number to be computed solely in accordance with the formula contained in By-law No. 5.2; or any of the by-laws specified in By-law No. 11.7 (a) as requiring a percentage of voting power greater than two-thirds (⅔); provided, however, that the power of the board of directors to adopt, amend or repeal by-laws may be revoked at any time by vote or written assent of Local Association members entitled to exercise a majority of the voting power.

11.8 *Effective Date of By-laws*—The effective date of these by-laws is and shall be 1958, and all by-laws heretofore adopted are hereby repealed and superseded by these by-laws.

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[fol. 1854x]

Dated .....

.....
Applicant

By .....

(Seal) Address .....

.....

The foregoing application is hereby accepted this ..... day of ....., 19.....

SUNKIST GROWERS, INC.

(Seal) By .....
Secretary

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[fol. 1854y] SUNKIST GROWERS, INC.

APPLICATION FOR MEMBERSHIP

The undersigned hereby applies for membership in Sunkist Growers, Inc., a California nonprofit cooperative marketing corporation, { as a Local Association member / as a District Exchange member } and hereby assents to, adopts, approves, agrees to be bound by, and ratifies as and for the articles of incorporation and by-laws of Sunkist, all of those provisions set forth and contained in the printed booklet to which this membership application is, or was, attached, together with all amendments thereto, if any there be, and any amendments hereafter adopted. Receipt of a copy of said printed booklet is hereby acknowledged.

This application, when accepted by Sunkist Growers, Inc., shall constitute the membership contract (specified in By-law No. 2.5) between applicant and Sunkist and between applicant { Local Association and District Exchange with which applicant is affiliated / District Exchange and Local Associations affiliated with applicant } for the benefit of all such parties, and for the benefit of each and every other member of Sunkist.

Said membership contract shall be and continue in effect until terminated as hereinafter provided but in no event for a longer period of time than is now or may hereafter be permitted by law:

(1) As provided for in By-law No. 2.7(a) or (b) or 2.8; or

(2) By delivery of written notice mailed during the last fifteen days of September of any year, such notice to be effective October 31 of such year, as follows:

(a) By any Local Association to the District Exchange with which it is affiliated and to Sunkist;

(b) By District Exchange to Local Association affiliated with it, and to Sunkist, in which event the Sunkist membership of such Local Association shall remain in full force and effect; provided, however, that said Local Association's membership may be terminated by notice to Sunkist or by Sunkist to said Local Association within ten (10) days after the receipt of the notice from the District Exchange. In the event the Local Association's membership remains in effect, such Local Association shall be affiliated with and market its fruit through another District Exchange; or

(c) By and District Exchange to Sunkist, in which event the Sunkist membership of the Local Association affiliated with such District Exchange shall remain in full force and effect, unless such Local Associations give the notice of termination herein specified. Each such Local Association shall be affiliated with and market its fruit through another District Exchange;

(d) By Sunkist to a District Exchange or to a Local Association.

[fol. 2110]

[Stamp—Lodged—Mar 1—1965—Clerk, U.S. District Court —Southern District of California—(illegible)—Deputy]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

No. 333-58 H W

CASE-SWAYNE CO., INC., Plaintiff,

vs.

SUNKIST GROWERS, INC., Defendant.

JUDGMENT—Lodged March 1, 1965 and entered March 2, 1965

This action came on for trial before the Court and a jury, the Honorable Harry C. Westover, District Judge, presiding, and the plaintiff having presented its case and rested, and the defendant having made a Motion for a Directed Verdict, and the Court having determined that there is no evidence which entitles the plaintiff to take its case to the jury, and that said motion should be granted, and having granted said motion, now makes the following

Judgment

It Is Ordered and Adjudged:

That plaintiff, Case-Swayne Co., Inc., take nothing, that the action be dismissed on the merits, and that defendant [fol. 2111] Sunkist Growers, Inc. recover of the plaintiff Case-Swayne Co., Inc. its costs of suit herein, taxed at $1327.71.

Dated at Los Angeles, California, this 2nd day of March, 1965.

Harry C. Westover, United States District Judge.

[File endorsement omitted]

[fol. 2111a]

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 20,070

CASE-SWAYNE CO., INC., a corporation, Appellant,

vs.

SUNKIST GROWERS, INC., a corporation, Appellee.

On Appeal from the United States District Court for the Southern District of California, Central Division.

OPINION—November 21, 1966

Before: Jertberg and Ely, Circuit Judges, and Jameson, District Judge.

JAMESON, District Judge:

This is an action seeking treble damages under section 4 of the Clayton Act (15 U.S.C. § 15)[1] for alleged monopoly and attempt to monopolize in violation of sections 1 and 2 of the Sherman Act (15 U.S.C. § 1, 2).[2] The district court

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[1] 15 U.S.C. § 15 provides:

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

[2] 15 U.S.C. § 1 provides in part:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the

[fol. 2111b] granted the defendant's motion for a directed verdict at the close of the plaintiff's case.[3]

Plaintiff (appellant), Case-Swayne, Inc., is engaged in the manufacture of single strength juices (canned orange juice and blends of orange juice with other fruit juice) as an independent operator. Defendant (appellee), Sunkist Growers, Inc., is an association of citrus producers.[4] It has as its base 12,000 citrus growers in Southern California and Arizona. The growers are organized into local associations which operate packing houses. The associations in turn are grouped into district exchanges and representatives from the exchanges make up the governing board of Sunkist. The Sunkist organization handles its members' fruit in effect from tree to store.

Appellant contends that the district court erred (1) in granting the defendant's motion for a directed verdict; and (2) in ruling that Sunkist was organized in conformance

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several States, or with foreign nations, is declared to be illegal: * * *"

* * *

Section 2 provides in part:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor * * *."

[3] At the close of plaintiff's case, the defendant moved for dismissal under Rule 41(b) F.R.Civ. P. or for a directed verdict under Rule 50(a). The court first indicated that it would dismiss pursuant to Rule 41(b), but later concluded that the motion for dismissal was improper and granted defendant's motion for a directed verdict under Rule 50(a).

[4] In addition to Sunkist Growers, Inc., the complaint named Exchange Orange Products Company and Exchange Lemon Products Company as defendants. Subsequently Exchange Orange and Exchange Lemon merged into Sunkist Growers, Inc., which assumed all of the obligations of the merged corporations, and the action was dismissed as to Exchange Orange and Exchange Lemon.

with section 1 of the Capper-Volstead Act[5] and therefore [fol. 2111c] could not be held in violation of section 1 of the Sherman Act for conspiracy to restrain and monopolize trade in product oranges. If Sunkist Growers, Inc., was in fact organized as an agricultural cooperative association pursuant to the Capper-Volstead Act,[5] as the district court found, any interorganizational dealings among the various agricultural cooperative associations are immune from the conspiracy provisions of section 1 of the Sherman Act;[6] but Sunkist may still be found liable under section 2 of the Sherman Act for wrongful use of monopoly power and attempt to monopolize.[7] The question presented under the first specification in error is whether the evidence was sufficient for the jury to find that Sunkist wrongfully used monopoly power or attempted to monopolize trade in product oranges.

In ruling on a motion for a directed verdict the trial court is required to view the evidence in the light most favorable to the party against whom the motion is made. "On appeal, likewise, the appellate court must consider the evidence in its strongest light in favor of the party against whom the motion * * * was made, and must give him the advantage of every fair and reasonable intendment that the evidence

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[5] Section 1 of the Capper-Volstead Act (7 U.S.C. 291) provides that, "Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: * * *"

[6] See Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., 1962, 370 U.S. 19, 82 S.Ct. 1130, 8 L.Ed.2d 305.

[7] See Maryland & Virginia Milk Producers Ass'n, Inc. v. United States, 1960, 362 U.S. 458, 80 S.Ct. 847, 4 L.Ed.2d 880; Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., supra.

can justify". 5 Moore's Federal Practice 2316 (2d.ed. 1951). This is true "even though contrary inferences might reasonably be drawn". Continental Ore Co. v. Union Carbide, 1962, 370 U.S. 690, 696, 82 S.Ct. 1404, 8 L.Ed.2d 777.

Sunkist controlled approximately 70% of all oranges produced in Southern California and Arizona, and approximately 67% of the oranges diverted to product use. Product or "excess" oranges are those not sold as fresh fruit. They are used to make various orange products and are the only kind used by plaintiff in its business. On a national basis Sunkist controlled 6 to 7% of the total production.

Other small cooperatives controlled for their own use approximately 18% of the oranges grown in Southern California and Arizona. The balance of the oranges, approxi- [fol. 2111d] mately 12%, represented those grown by independent growers and available to independent manufacturers.

Additional facts set forth in the order granting defendant's motion for directed verdict include the following;[8]

(1) Prior to the development of the citrus juice industry there was no market for fruit not required by the fresh fruit market, and the remainder of the fruit, then called "culls", was destroyed by the packing houses. With the development of the citrus juice industry, the demand for culls, now designated "excess fruit", could be sold to processors to convert into juice and other by-products.

(2) At the beginning of its processing activity plaintiff had no difficulty in obtaining at a reasonable price sufficient fruit for its needs. When it was demonstrated that conversion of excess fruit into juice and other citrus by-products was profitable, Sunkist decided to process its own fruit and for that purpose organized Exchange Orange Products Company and Exchange Lemon Products Company.

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[8] All of the facts are substantially in the language of the district court, although they do not appear in the court's order in the same sequence.

(3) Fruit not so processed was sold to independent processors, including plaintiff. Sunkist had excess fruit available for sale to independent processors only when it was unable to process its own fruit. For several years Sunkist sold its excess fruit to independent processors by a bid system. All independent processors, including plaintiff, were invited to present bids for fruit to be sold.

(4) As time went on and as Exchange Orange and Exchange Lemon developed processing capabilities, more and more excess fruit from Sunkist packing houses was channeled to Exchange Orange and Exchange Lemon until, at the present time, practically no Sunkist fruit is sold to independent processors.

(5) Plaintiff attempted to obtain from other mutual citrus associations its requirement of fruit to process, only to find that such associations had entered into individual contracts with other processors; hence plaintiff was able to obtain very little fruit supply from mutual associations.

[fol. 2111e] (6) Approximately 12,000 citrus fruit growers annually signed contracts with Sunkist agreeing to sell fruit through the Sunkist organization. The contracts provided that if a grower did not abide by his contract, sanctions might be imposed. Occasionally a grower failed to sell his fruit to Sunkist, and sanctions were imposed by the Sunkist organization.

(7) Sunkist trade-mark or trade name was a valuable asset, and defendant had spent large sums in establishing its trade-mark or trade name.

(8) Sunkist employees observed operations of member growers to make certain that the growers handled their crops through the Sunkist organization and if it was discovered that a member grower sold fruit contrary to his contract, a report was made to Sunkist and, in certain instances, penalties were imposed upon the violating grower.

(9) The Department of Agriculture, pursuant to the school lunch program, requested bids for single strength

orange juice. One year Sunkist bid but did not receive the contract and another year, Sunkist bid and was awarded the contract.

(10) Sunkist made a large profit from sale of citrus fruit.

(11) The great majority of citrus grown in Southern California and Arizona goes into the fresh fruit market. The greater amount of oranges grown in Florida goes into the citrus products market. Fresh fruit from California, Arizona and Florida compete on the eastern and foreign markets.

(12) It was possible for processors in Florida to make single strength orange juice, can and ship it to California, and sell it at the same price as (or at a price lower than) the Southern California-Arizona produced juice. Florida processors of single strength orange juice could assimilate transportation costs from Florida to California and sell their product in competition with single strength orange juice made within the Southern California-Arizona area. This was possible because of the lower price for which Florida fruit could be purchased.

(13) The price paid for Florida oranges was the dominant factor in determining the price for which single strength orange juice could be sold to the ultimate consumer.

[fol. 2111f] (14) There is also competition between single strength orange juice and orange juice concentrates. Neither of the parties is a producer of concentrated or frozen juice.

The alleged violations of the Sherman Act arise out of "Sunkist's dominant control of oranges grown in Arizona and California together with its vertical integration and dual distribution with respect to oranges designated for product use . . .". More particularly, plaintiff complains that it was unable to purchase oranges for product use

from Sunkist at a price that would enable it to compete with canned juice shipped in from Florida.[9]

The district court's granting of the directed verdict was premised upon the conclusion that the "relevant market" was national rather than limited to California-Arizona, and that in light of this plaintiff had not shown evidence of an illegal monopoly.[10]

The cases uniformly hold that "a party has monopoly power if it has over 'any part of the trade or commerce among the several states', a power of controlling prices or unreasonably restricting competition". United States v. du Pont & Co., 1956, 351 U.S. 377, 389, 76 S.Ct. 994, 100 L.Ed. 1264. In determining whether a party has monopoly power it is first essential to define the "relevant market".

This court has held that determination of the relevant market, "both as respects products and as concerns geographical area" is a "necessary step precedent to determining whether within that market there was a probability" of violation of section 7 of the Clayton Act. Crown Zellerbach Corporation v. F.T.C., 1961, 296 F.2d 800, 804 (cert. denied (1962)), 370 U.S. 937, 82 S.Ct. 1577, 8 L.Ed.2d 806. While Crown Zellerbach involved a violation of the Clayton Act with respect to corporate acquisitions, it is clear that the same determination must be made regarding the rele- [fol. 2111g] vant market in actions for violation of section 2 of the Sherman Act. United States v. du Pont & Co., supra.

In the recent case of United States v. Grinnell Corp., 1966, 384 U.S. 563, ... S.Ct. ....., ... L.Ed.2d ....., a

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[9] This is not a complete statement of the alleged monopolistic acts of Sunkist, but it is the act upon which plaintiff places the most emphasis.

[10] The district court initially was of the opinion that the relevant market was Southern California and Arizona, but concluded, when all of the evidence was presented, that the relevant market for product oranges was a national market, "and that whatever happened in Florida directly affected prices in California and vice versa. Prices paid for oranges in California depended substantially upon the price for which oranges were sold in Florida".

civil suit for alleged violations of section 2 of the Sherman Act, the Court said in part:

> "* * * That * * * case arose under § 7 of the Clayton Act where the question was whether the effect of a merger 'in any line of commerce' may be 'substantially to lessen competition.' We see no reason to differentiate between 'line' of commerce in the context of the Clayton Act and 'part' of commerce for purposes of the Sherman Act." (384 U.S. at 573).

In determining the "relevant market" applicable in this case, it seems advisable first to analyze separately the factors involved in both the relevant *product* market and the relevant *geographic* market.

Relevant Product Market

United States v. du Pont & Co., supra, relied upon by the district court in granting Sunkist's motion for a directed verdict, promulgated the test of "reasonable interchangeability" to determine the relevant product market. The Government contended that cellophane was the relevant product market. The Court assumed that if this were true, du Pont would have monopoly power over that market. The Court found, however, that cellophane was "reasonably interchangeable" with other flexible wrappings, and that the relevant product market accordingly was "flexible packaging materials" rather than cellophane alone.

The rule of "reasonable interchangeability" has been refined and modified in subsequent cases. In particular, the courts have recognized that there may be an outer market and one or more inner submarkets within which competitive effects are to be appraised, i.e. a relevant submarket may constitute the product market for antitrust purposes.

In Brown Shoe Co. v. United States, 1962, 370 U.S. 294, 82 S.Ct. 1502, 8 L.Ed.2d 510, involving a merger found to be in violation of section 7 of the Clayton Act, the Court said in part:

[fol. 2111h] "The 'area of effective competition' must be determined by reference to a product market (the 'line of commerce') and a geographic market (the 'section of the country')."

"The Product Market

"The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes. (citation) The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." (370 U.S. at 324-5).

The rule of Brown Shoe was expressly applied to cases arising under section 2 of the Sherman Act in the recent case of United States v. Grinnell Corporation, supra, where the Court said:

"In § 2 cases under the Sherman Act, as in § 7 cases under the Clayton Act (Brown Shoe Co. v. United States, 370 U.S. 294, 325) there may be submarkets that are separate economic entities." (384 U.S. at 573).

Relevant Geographic Market

In Brown Shoe, supra, the Court also set forth criteria to be used in determination of the geographic market:

"The Geographic Market

"The criteria to be used in determining the appropriate geographic market are essentially similar to

those used to determine the relevant product market. See S. Rep. No. 1775, 81st Cong. 2d Sess. 5-6; United States v. E. I. du Pont de Nemours & Co., 358 U.S. 586, 593. Moreover, just as a product submarket may have § 7 significance as the proper 'line of commerce', so may a geographic submarket be considered the appropriate 'section of the country.' (Citing cases). Congress prescribed a pragmatic, factual approach to the definition of the relevant market and not a formal, [fol. 2111i] legalistic one. The geographic market selected must, therefore, both 'correspond to the commercial realities' of the industry and be economically significant. Thus, although the geographic market in some instances may encompass the entire Nation, under other circumstances it may be as small as a single metropolitan area." (370 U.S. at 336-7).

In the recent case of United States v. Pabst Brewing Company, et al., 1966, 384 U.S. 546, 552, ... S.Ct. ....., ... L.Ed.2d ....., involving the acquisition in 1958 by Pabst Brewing Company of Blatz's Brewing Company, the Court held that the "evidence as to the probable effect of the merger on competition in Wisconsin, in the three-state area (Wisconsin, Illinois and Michigan), and in the entire country was amply sufficient to show a violation of § 7 (of the Clayton Act as amended by the Celler-Kefauver Anti-Merger Amendment)[11] in each and all of these three areas". In 1957, prior to the merger, the two companies had combined sales which accounted for 23.95% of the beer sales in Wisconsin, 11.32% of the sales in the three-state area, and 4.49% of the sales throughout the country.

The Court was unanimous in holding that the district court erred in dismissing the complaint. Mr. Justice Harlan (joined by Mr. Justice Stewart) in a concurring opinion agreed with the district court that viewing the entire con-

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[11] 38 Stat. 731, as amended, 64 Stat. 1125, 15 U.S.C. § 18 (1964 ed.).

tinental United States as a relevant market, the evidence did not sustain the Government's contention that the acquisition might substantially lessen competition. They agreed with the majority opinion, however, as did Mr. Justice Fortas, that the Government's evidence was sufficient to establish prima facie that Wisconsin and the tri-state area were proper "sections of the country" in which to measure the probable effects of the acquisition.

In his concurring opinion, Mr. Justice Harlan said in pertinent part:

> "The appropriate geographic area in which to examine the effects of an acquisition is an area in which the parties to the merger or acquisition compete, and around which there exist economic barriers that significantly impede the entry of new competitors. * * *" (384 U.S. at 556-7).

[fol. 2111j] Whether a geographical location is or is not an "area of effective competition" is a question of fact in each case. United States v. Columbia Pictures Corporation, S.D. N.Y., 1960, 189 F.Supp. 153, 192. The area may be limited by differences in costs of production and transportation. Erie Sand & Gravel Co. v. F.T.C., 3 Cir. 1961, 291 F.2d 659, 281. "A competitive price disadvantage arising from transportation costs is an important factor in determining the scope of a relevant market". United States v. Penn-Olin Chemical Company, D. Del., 1963, 217 F.Supp. 110, 120; American Crystal Sugar Co. v. Cuban-American Sugar Co., S.D. N.Y., 1957, 152 F.Supp. 387, 398, Aff'd. 2 Cir. 1958, 259 F.2d 524.

It seems clear from the decided cases that (1) while the outer limits of the market may be determined by the competition of interchangeable products, (2) there may be a well-defined submarket which constitutes the relevant market for antitrust purposes, which (3) must correspond to the commercial realities of the industry, (4) is affected by price disadvantages due to transportation costs, (5) is affected by availability of a buyer to supply and existence

of economic areas which significantly impede competition, (6) is determined in part with relation to the parties affected in the suit, and (7) is a question of fact in the particular case.

We come now to an application of the criteria for determining both relevant product market and relevant geographic market to the facts in this case. In advance of trial it was the position of the trial court, as set forth in its pretrial order, that the relevant product market was product oranges and the relevant geographic market Southern California and Arizona. At the close of plaintiff's case, the court was persuaded that the relevant product market included orange juices and concentrates and that the relevant geographic market was national rather than limited to Southern California and Arizona.[12]

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[12] In ruling on defendant's motion for dismissal or a directed verdict, following argument by counsel, the court said:

"I was of the opinion that Florida was not a part of the market; that it was to be limited to Southern California and Arizona. I was of the opinion and still am of the opinion that it would certainly be uneconomical to try to ship fresh fruit from Florida or from Texas to California for the purpose of being converted into orange juice. So I have to look first to what is the competition in this case, what are the competitive factors?

"Well, if we include Florida as part of the market, then of course Sunkist does not have a dominant place in this picture at all. It is a very minor part of the conversion of fresh fruit into orange juice, if we consider Florida as a part of the market.

"Then I thought we were talking about product oranges, the monopoly of product oranges. But it seems to me that we now are talking about product oranges, but also about the juice squeezed from the product oranges. I don't know how you can say that there is a monopoly on product oranges without saying there is a monopoly on the juice that is squeezed from product oranges." (Rep. Tr. 1378:1-20).

"So it seems to me that when we talk about competition, we are going to talk about competition not only of the fruit before it is squeezed, but the product after the squeezing, that is the orange juice.

"Well, if you consider it in that light, then there is lots of competition on the shelves of Southern California, because the

[fol. 2111k] It is clear from the evidence that *orange products* (single strength juice and frozen concentrates) were sold in a national market. Oranges could be processed in Florida, and the juice shipped to California and sold competitively with juice processed in California from California oranges. Sunkist held a relatively small part of this national market and controlled neither quantity nor price.

On the other hand, it is equally clear that it was uneconomical for producers of orange products to buy their *product oranges* in Florida or elsewhere than in the Southern California-Arizona area. Sunkist controlled 70% of all oranges grown in this area and 67% of the product oranges. A substantial portion of the remaining product was unavailable to Case-Swayne.

Appellee does not question these facts, but contends that the relevant geographic market for product oranges was na-[fol. 2111 l] tional on the theory that the product orange supply is tied irrevocably to orange product price. Appellee argues that product oranges "have value only because they can be converted into a product which has value", and that "the value of product oranges cannot exceed that which will permit them to be processed into products and then compete in a national products market dominated by Florida".

While product oranges may have little, if any, value per se, the same is true of many raw products. The market for raw products is among the processors rather than the ultimate consumer. We see no reason why the raw product may not be the relevant product market, even though it has little value in its raw state. Moreover, it is clear from the recent case of United States v. Pabst Brewing Company, supra, that even as to the processed product, the relevant

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testimony is that the Florida producers, the Florida producers of orange juice, that is, those who squeeze the oranges to make orange juice in Florida, can ship it to Los Angeles, pay the shipping charges, and undersell the California product.

"So from these two standpoints, that is talking about competition, what is competition—competition is the competition in the open marketplace." (Rep. Tr. 1379:9-22).

market may at the same time be national, regional, and statewide in area.[13]

While Sunkist could not control the supply or price of canned juices because of competition from Florida in these products, there was substantial evidence that it did control the supply of product oranges from which juice was made in California and Arizona. In determining the relevant geographic market, a proper test is the "geographic structure of supplier-customer relations." United States v. Philadelphia National Bank, et al., 1963, 374 U.S. 321, 357, 83 S.Ct. 1715, 10 L.Ed.2d 915. The relevant market is determined in part by the market area "to which the purchaser can practicably turn for supplies". Tampa Electric Co. v. National Coal Co., 1961, 365 U.S. 320, 327, 81 S.Ct. 623, 5 L.Ed.2d 580.[14] There is no question that Case-Swayne and other users of product oranges could not as a practical matter obtain product oranges from suppliers outside California and Arizona.

[fol. 2111m] Moreover, even though the price of product oranges in Florida would influence the price of product oranges in California, there was evidence from which the jury might find that Sunkist by reason of its control of the supply also as a practical matter controlled the price.[15]

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[13] We concluded in Sunkist Growers, Inc. v. Winckler & Smith Citrus Prod. Co., 9 Cir. 1960, 284 F.2d 1, that the relevant market area for oranges and by-products, including fruits and juices, was the California-Arizona area, although it does not appear that the parties in that case argued or the court considered the distinction between product oranges and orange products or any contention that the market was national.

[14] See also Standard Oil Co. v. United States, 1945, 337 U.S. 293, 299, note 5, 69 S.Ct. 1051, 93 L.Ed. 1371.

[15] Morgan Ward, who handled the oranges of most of the independent growers, testified in pertinent part:

"Q Is it your opinion, then, that the market conditions with respect to Florida product oranges have more effect on the price of product oranges in California than any one factor?

"A They have effect on the over-all United States. Then those who set prices on the fruit in California look at what is

That is particularly true if it should be found that Sunkist refused to sell to plaintiff and other independent buyers at any price.

As Mr. Justice Fortas said in his dissenting opinion[16] in the recent case of United States v. Grinnell Corporation, supra, "The central issue is where does a potential buyer look for potential suppliers of the service—what is the geographical area in which the buyer has, or, in the absence of monopoly, would have, a real choice as to price and alternative facilities? This depends upon the facts of the market place, taking into account such economic factors as the distance over which supplies and services may be feasibly furnished, consistently with cost and functional efficiency." (384 U.S. at 589).

We conclude that there was evidence from which the jury might properly find that the relevant product market was product oranges and the relevant geographic market Southern California-Arizona.

[fol. 2111n] *Evidence of Wrongful Use of Monopoly Power and Attempt to Monopolize*

If the jury should find that Southern California and Arizona was the relevant market, there was sufficient evidence from which the jury could find further that Sunkist engaged in monopolistic practices or an attempt to monopolize proscribed by section 2 of the Sherman Act.

As the Court said in United States v. Grinnell Corp., supra:

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going on all over the United States, and at that time the prices were set in California by the leading growers, Sunkist set it, using all those things to do it, I assume. But the price of by-products in this state has ever since I have been in the business since 1934, been set by Sunkist. At one time it was called California Fruit Growers Exchange, and Sunkist at this time." (Rep. Tr. 392:1-14).

[16] Justices Fortas, Stewart and Harlan would have remanded for a "new determination" of the basic issue of "the definition of the relevant market".

"The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."

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"In United States v. du Pont & Co., 351 U.S. 377, 391, we defined monopoly power as 'the power to control prices or exclude competition.' The existence of such power ordinarily may be inferred from the predominant share of the market. In American Tobacco Co. v. United States, 328 U.S. 781, 797, we said that 'over two-thirds of the entire domestic field of cigarettes and . . . ; over 80 per cent of the field of comparable cigarettes' constituted 'a substantial monopoly.'" (384 U.S. at 570-1).

It is clear that Sunkist had possession of monopoly power in the relevant market, if that market is found to be the Southern California-Arizona area.

It is true, as appellee contends, that size alone does not constitute an offense under the Sherman Act; nor does the mere possession of monopoly power. It is the wrongful use and exercise of that power which is proscribed by section 2 of the Act.

However, the ultimate consideration in determining whether an alleged monopolist violates section 2 of the Sherman Act is "whether the defendants control the price and competition in the market for such part of trade or commerce as they are charged with monopolizing". United [fol. 2111o] States v. du Pont & Co., supra, 351 U.S. at 380. It is not always necessary to find a specific intent to find that an antitrust law has been violated. "It is sufficient that a restraint of trade or monopoly results as the consequence of a defendant's conduct or business arrangements

(citing cases). To require a greater showing would cripple the Act. As stated in United States v. Aluminum Co. of America, 148 F.2d 416, 432, 'no monopolist monopolizes unconscious of what he is doing.' Specific intent in the sense in which the common law used the term is necessary only where the acts fall short of the results condemned by the Act." United States v. Griffith, 1948, 334 U.S. 100, 105, 68 S.Ct. 941, 92 L.Ed. 1236.

Appellant contends that Sunkist wrongfully exercised its monopoly power through (1) boycotting appellant by refusing to sell appellant product oranges while selling to other processors; (2) preventing TreeSweet from delivering oranges TreeSweet had committed to appellant; (3) controlling orange prices; and (4) eliminating competitors (or as with appellant, limiting their profits) by maintaining high prices for oranges or reducing supply.

The same acts are relied upon in support of appellant's contention that Sunkist intentionally attempted to monopolize the trade in product oranges in the relevant market. Appellant relies upon additional evidence of such intent in Sunkist's (1) admitted purpose to control all the oranges it could get and utilize all of them in its own manufacturing facilities; (2) preventing Placentia Orange Distributors from fulfilling its promise to sell appellant 5,000 tons of oranges in 1957; (3) policing the Sunkist system to punish violators of the Sunkist "restrictive tying contracts"; (4) wrongful use of dual distribution by lowering single strength juice prices after competing manufacturers had purchased product oranges at prices established by Sunkist; (5) use of consignment contracts and its low 1956 bid (compared with its 1955 bid) to the Department of Agriculture.

Appellee recognizes in its brief that "the key determination by the trial court was that the appellant's evidence * * * established the fact that the relevant market for product oranges is a national market", but contends further that "under each of the tests which the courts have applied to de- [fol. 2111p] termine whether or not a monopoly exists, the

appellant's evidence conclusively established that there was no monopoly", and that with respect to each of the acts and incidents upon which appellant relies, Sunkist's conduct was "legitimate, cooperative activity and not undertaken in an unlawful manner or for an unlawful purpose". There is substantial evidence to support appellee's denial of each of the alleged acts of monopoly.

In determining the issues of monopolization and intent to monopolize, however, the evidence must be viewed as a whole. Even though the proof as to each of the specific acts may be insufficient in itself to establish wrongful use of monopoly power, the jury must look at the "whole picture", weigh the contradictory evidence and inferences and draw the "ultimate conclusion as to the facts". See Continental Ore Co. v. Union Carbide and Carbon Corp., supra, 370 U.S. at 699-701, and cases there cited.

As noted supra, in ruling on the directed verdict this court must give appellant "the advantage of every fair and reasonable intendment that the evidence can justify", and this is true "even though contrary inferences might reasonably be drawn". From a review of the record we conclude that there was sufficient evidence to submit to the jury the question of whether Sunkist wrongfully exercised its monopoly power and intentionally attempted to monopolize the trade in product oranges. We do not find that appellant has established any of the alleged acts of monopoly—only that viewing the evidence as a whole, it has made a prima facie case for the jury.[17]

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[17] In Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., supra, the plaintiff relied upon some of the acts of monopoly here alleged. We upheld the submission of the case to the jury and the instructions given by the trial court. The Supreme Court granted certiorari limited to the issue of the immunity of inter-organizational dealings among the three cooperatives from the conspiracy provisions of the antitrust law, and held that as a Capper-Volstead cooperative Sunkist was immune and that the case was erroneously submitted to the jury on the theory of a conspiracy under section 1 of the Act. Having held "erroneous one theory of liability upon which the general verdict may have rested * * *

[fol. 2111q] *Section 1 of the Capper-Volstead Act*

Appellant contends that Sunkist is not a person "engaged in the production of agricultural products" under Section 1 of the Capper-Volstead Act because only 80.12% of its members are associations composed of fruit growers, while 4.97% are corporate growers, and 14.91% are private profit-making corporations, individuals and partnerships which market through Sunkist the oranges they have purchased from growers.[18]

The district court concluded, and we think correctly, that under the decision of the Supreme Court in Sunkist Growers, Inc. v. Winckler & Smith Co., supra, Sunkist Growers, Inc., is a cooperative organized in compliance with Section 1 of the Capper-Volstead Act. It is true, as appellant argues, that this issue was not specifically raised in the Winckler case, but the Court did describe the Sunkist organization in detail. This was prior to the merger with Exchange Orange and Exchange Lemon, but the Court con-

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it is unnecessary * * * to explore the legality of the other theories". The Court said further that its decision "in no way detracts from earlier cases holding agricultural cooperatives liable for * * * monopolization", citing Maryland & Virginia Milk Producers Ass'n. v. United States, supra. Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., 370 U.S. at 20-30.

[18] A stipulation of the parties defining "association" in the Sunkist system recites that the members are classified into three major groups: (1) cooperative associations (80.12% by number and 82.34% by volume), (2) corporate growers (4.97% by number and 4.72% by volume), and (3) agency associations (14.91% by number and 12.94% by volume). The stipulation reads in part: "The Agency Association is normally a private corporation which owns and operates packing house facilities * * *. Such Agency Associations do not qualify as, nor do they claim to be, cooperative associations under section 1 of the Capper-Volstead Act. * * * The Agency Association does not itself participate in either the gain or loss involved in marketing fruit through Sunkist beyond the recovery of its costs and fixed fee for packing. Such Agency Association furnishes its facilities and services on an independent contract basis, wholly unrelated to the net returns from the sale of the product handled". (Clk. Tr. 1792-4).

cluded that the 12,000 growers were "in practical effect and in the contemplation of the statutes one 'organization' or 'association' even though * * * formally organized * * * into three separate legal entities". (370 U.S. at 29). The Court also said in pertinent part:

> "The language of the Capper-Volstead Act is specific in permitting concerted efforts by farmers in the proc- [fol. 2111r] essing, preparing for market, and marketing of their products. And the legislative history of the Acts reveals several references to the Sunkist organization—then called the California Fruit Growers Exchange and numbering 11,000 members—including a suggestion by Senator Capper that this was a type of cooperative that would find 'definite legalization' under legislation. * * *
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> "* * * That the packing is done by local associations, the advertising, sales, and traffic by divisions of the area association, and the processing by separate organizations does not in our opinion preclude these growers from being considered one organization or association for purposes of the Clayton and Capper-Volstead Acts." (370 U.S. at 28-29).

With respect to appellant's contention that Sunkist is not a qualified cooperative under Capper-Volstead by reason of its "corporate growers", this question was raised in the district court in United States v. Maryland & Virginia Milk Producers Ass'n, D. D.C. 1958, 167 F.Supp. 45, aff'd in part, reversed in part on other grounds, 362 U.S. 458, 80 S.Ct. 847, 4 L.Ed.2d 880. In that case the Government urged that the words "dairymen" and "farmers" should be restricted to natural persons. The district court held that it was immaterial "whether every member of the association is a natural person or a corporation." [19]

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[19] The court said further:

"* * * The owner or operator of a dairy is a dairyman, whether he personally works on his dairy or has the work done by

The Supreme Court did not comment on this portion of the district court's opinion, although it considered at length the scope of the immunity granted by Capper-Volstead. It is clear from the district court's opinion that the cooperative included corporate growers. It seems likely that this fact would have been considered by the Supreme Court if there were any question regarding the status of the association as a qualified cooperative by reason of the corporate growers.

[fol. 2111s] 1 U.S.C. 1 provides that in "determining the meaning of any act * * * of Congress, unless the context indicates otherwise * * * the words 'person' and 'whoever' includes corporations * * * as well as individuals * * * ".

We find nothing in the context of the Capper-Volstead Act to indicate that a corporation would not be considered a person within the meaning of the Act.

Does the fact that the so-called agency associations (comprising 14.91% by number and 12.94% by volume) constitute a "class" of membership prevent Sunkist from being a "person engaged in the production of agricultural products" under section 1 of the Act? It will be noted from the stipulation of the parties (note 18) that the agency associations furnish their facilities and services on an independent contract basis, and that they do not participate in either gain or loss involved in marketing fruit through Sunkist. In other words, the growers receive full benefit of cooperative marketing through the agencies.

Associations organized under the Capper-Volstead Act "may make the necessary contracts and agreements to effect" the purposes of the Act, i.e., "collectively processing, preparing for market, handling, and marketing" their products. (7 U.S.C. 291). The agency associations supply services which the growers require (packing house facilities) in handling and marketing their products. The fact that the

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employees. So, too, the owner of a farm may be regarded as a farmer even though he devotes the major portion of his activities to other pursuits. * * *." (167 F.Supp. at 49).

"packing is done by local associations * * * and the processing by separate organizations" does not preclude the growers from being considered one association for purposes of the Capper-Volstead Act. Sunkist Growers, Inc. v. Winckler & Smith Co. supra.

This is not a case where the agreement in question goes beyond the legitimate objects of processing and marketing. See e.g. United States v. Borden Co., 1939, 308 U.S. 188, 60 S.Ct. 182, 84 L.Ed. 181. The Court there recognized that agricultural producers "may unite in preparing for market and in marketing their products", and may "make the contracts which are necessary for that collaboration", but they are not authorized to conspire with others in restraint of trade. The Court said in part:

> "In this instance, the conspiracy charged is not that of merely forming a collective association of producers [fol. 2111t] to market their products but a conspiracy, or conspiracies, with major distributors and their allied groups, with labor officials, municipal officials, and others, in order to maintain artificial and non-competitive prices to be paid to all producers for all fluid milk produced in Illinois * * * and also to control 'the supply of fluid milk permitted to be brought to Chicago'." (308 U.S. at 205).

In Maryland & Virginia Milk Producers Association v. United States, supra, the court pointed out that the object of the conspiracy or combination was to eliminate a competitor and that the "allegations of the complaint * * * charge *anticompetitive activities which are so far outside the 'legitimate objects' of a cooperative* that, if proved, they would constitute clear violations of § 2 of the Sherman Act * * *." (362 U.S. at 468). (Emphasis added). The Court said further:

> "The Embassy assets the Association acquired are useful in processing and marketing milk, and we may assume, as it is contended, that *their purchase simply for*

business use, without more, often would be permitted and would be lawful under the Capper-Volstead Act. * * * The contract of purchase here, viewed in the context of all the evidence and findings, *was not one made merely to advance the Association's own permissible processing and marketing business;* it was entered into by both parties, according to the court's findings as we understand them, because of its usefulness as a weapon to restrain and suppress competitors and competition * * *." (362 U.S. at 471-72). (Emphasis added).

The independent contracts with the agency associations were for the legitimate objects of processing and marketing. Under the statute Sunkist could have entered into these contracts "with separate organizations". The mere fact that the agency associations constitute a "class" of membership does not in our opinion change the effect of the agency agreements or destroy the exempt status of the entire association.

[fol. 2111u]

Request for Leave to File Second Supplemental Complaint

Appellant next contends that the district court abused its discretion in denying plaintiff's motion to file a second supplemental complaint alleging facts occurring after the filing of the original complaint. In our opinion, upon remand of this case, appellant should be permitted to file the supplemental complaint. As the Court said in Texarkana v. Arkansas Gas Co., 1939, 306 U.S. 188, 59 S.Ct. 448, 83 L.Ed. 598:

"Where there is a good cause of action stated in the original bill, a supplemental bill setting up facts subsequently occurring which justifies other or further relief is proper. If the original decree in the trial court had not been entered, this supplemental petition would

simplify the controversy. We think this procedure is equally applicable after remand for further proceedings." (306 U.S. at 203).

Alleged Prejudice and Bias of Trial Judge

Finally appellant contends that the trial judge showed such marked prejudice against appellant that this court should order a new trial before another judge. In our opinion, the record does not support our issuance of the requested order. We are confident that the district court, upon remand and in the proper administration of its own functions, will insure that the retrial is conducted in the necessary atmosphere of total impartiality.

It Is Ordered that the judgment be reversed and the cause remanded to the district court for a new trial.

ELY, Circuit Judge (Dissenting in part):

I agree with the result reached by the majority, and I concur in its opinion except for that portion in which it is held that Sunkist falls within the exemption of section 1 of the Capper-Volstead Act, 7 U.S.C. § 291.

The principal reason offered by the majority in support of the view which I question is its asserted belief that the question was settled in *Sunkist* v. *Winckler & Smith Co.*, 370 U.S. 19, 8 L. Ed. 2d 305, 82 Sup. Ct. 1130 (1962). I do not so interpret that decision. The particular issue was not presented to the Supreme Court, and it was not [fol. 2111v] adjudicated. It was apparently conceded by the parties in *Winckler*, of which the appellant here was not one, that Sunkist was covered by the Capper-Volstead exemption. In the prior opinion of the Court of Appeals, reported at 284 F.2d 1 (9th Cir. 1960), the only discussion of the exemption pertained to its extent, not to whether or not it was applicable. Furthermore, the Supreme Court, in granting certiorari, 368 U.S. 813 (1961), expressly limited its consideration to a single question, namely,

> "Where a group of citrus fruit *growers* form a cooperative organization for the purpose of collectively processing and marketing their fruit, and carry out those functions through the agency of three cooperative agricultural associations, each of which is basically *wholly owned and governed by those growers, and each of which is admittedly entitled to the exemption from the antitrust laws accorded to agricultural cooperatives by the Capper-Volstead Act* (7 U. S. C. A., sec. 291)—is an unlawful conspiracy, combination or agreement established under Sections 1 and 2 of the Sherman Act upon proof only that these *growers*, through the agency of these three cooperatives, *agreed among only themselves* with respect to the extent of the division of the function of processing between them or with respect to the price they would charge in the open market for the fruit and the by-products thereof processed and marketed by them?" (Emphasis supplied.)

Even if the issue had been determined by the Supreme Court in *Winckler*, the admitted nature of Sunkist's present organizational make-up is such that the exemption should no longer be held properly to apply. The privilege to act together in "exempt" associations is conferred only upon "persons engaged in the production of agricultural products. . . ." 7 U.S.C. § 291. The plain import of the statutory language is that such an association must be composed *solely* of agricultural producers. Regardless of whether Sunkist was thus composed at the time of the *Winckler* decision in 1962, as the Supreme Court's order granting certiorari, *supra*, indicates, it is clear that the composition is no longer the same. In our case, it is conceded that the so-called "agency associations," which comprise almost 15% of the membership of the Sunkist organization, are [fol. 2111w] *not* growers or producers.[1] The majority, in

[1] In its footnote 18, the majority refers to a portion of a stipulation wherein the parties agreed that the agency associations furnished to Sunkist their "facilities and services on an independent

disregarding the significance of this factor, may have been influenced by the absence of decisions squarely holding that an association must be composed entirely of growers in order to qualify for the exemption. I point out that, while there are no decisions to that effect, there are none to the contrary. The opinions in a number of cases contain language which suggests the conclusion which I see to be plainly required by the statute's terms. Some of this language is as follows:

> "The persons to whom the Capper-Volstead Act applies are defined in § 1 as *producers of agricultural products* . . . . *They* are authorized to act together 'in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce' their products . . . .
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> "The right of *these agricultural producers* thus to unite . . . cannot be deemed to authorize any combination or conspiracy *with other persons* in restraint of trade that these producers may see fit to devise." *United States v. Borden Co.*, 308 U.S. 188, 204-205, 84 L. Ed. 181, 60 Sup. Ct. 182 (1939) (Emphasis supplied.).

> "The chief defense set up by the Association was that, because of its being a cooperative composed *exclusively of dairy farmers,* § 6 of the Clayton Act and §§ 1 and 2 of the Capper-Volstead Act completely exempted and immunized it . . . . Accordingly the court dismissed the Sherman Act § 2 monopolization charge, where the

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contract basis . . . ." The stipulation does *not* say that the associations were independent contractors. It recites that they were "*members*" of the Sunkist system. If the association were truly separate and independent, then that determination should be made, in the first instance, by the District Court. If they were not "members" of the Sunkist system, then, as I see it, the exemption of the Capper-Volstead Act is irrelevant to the issue of the propriety of Sunkist's dealings with them. *United States v. Borden Co., supra.*

Association was not alleged to have acted in combination with others, but upheld the right of the Government to go to trial on the Sherman Act § 3 and Clayton Act § 7 charges *because they involved alleged activi-* [fol. 2111x] *ties with* the owners of Embassy and other *persons who were not agricultural producers.*" *Milk Producers Assn. v. U.S.*, 362 U.S. 458, 461-462, 4 L. Ed. 2d 880, 80 Sup. Ct. 847 (1960) (Emphasis supplied.).

"Thus, the full effect of § 6 is that a *group of farmers* acting together . . . cannot be restrained . . . .

"The Capper-Volstead Act . . . extended § 6 of the Clayton Act exemption to capital stock agricultural cooperatives . . . . the general philosophy of both was simply that *individual farmers* should be given . . . . the same unified competitive advantage . . . available to businessmen . . . . ." *Id.*, 362 U.S. at 465-466 (Emphasis supplied.).

"[O]ur decision in no way detracts from earlier cases holding agricultural cooperatives liable for conspiracies with outside groups, *United States v. Borden Co.*, 308 U.S. 188 . . . ." *Sunkist v. Winckler & Smith Co.*, 370 U.S. 19, 30, 8 L. Ed. 2d 305, 82 Sup. Ct. 1130 (1962).

"The Court concludes that a combination between two or more agricultural cooperatives to fix prices of their products is exempt from the antitrust laws *provided that no other person that is not such an organization or a member of such a group is a part of the combination.*" *United States v. Maryland Cooperative Milk Pro.*, 145 F. Supp. 151, 155 (D.D.C. 1956) (Emphasis supplied.).

"*Although* the Capper-Volstead Act . . . and the Clayton Act . . . give *some privileges to combinations* of agricultural *producers, a combination of producers and distributors* to eliminate competition and fix prices at successive stages in the marketing of an agricultural

product *is not privileged." United States v. Maryland & Virginia Milk Pro. Ass'n,* 179 F.2d 426, 428 (D.C. Cir. 1949) (Emphasis supplied.).

"The exemptions are accorded and immunities are conferred on agricultural cooperatives and their activities. *When they* step outside of their field and *conspire with persons who are not producers of agricultural commodities,* they are *beyond the scope of the exemptions." United States v. Maryland & Virginia Milk Pro. Ass'n,* 167 F. Supp. 45, 51-52 (D.D.C. 1958), *modified,* 362 [fol. 2111y] U.S. 458, 4 L. Ed. 2d 880, 80 Sup. Ct. 847 (1960) (Emphasis supplied.).

The persistent theme of the foregoing excerpts is that a cooperative, even though it otherwise qualifies for exemption under the Capper-Volstead Act, forfeits its exemption when it combines with non-producers. If that is so, then it is logically inconsistent to hold that a cooperative, while composed in part of nonproducers, may yet qualify for the exemption.

[fol. 2111z]

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 20,070

CASE-SWAYNE CO., INC., a corp., Appellant,

vs.

SUNKIST GROWERS, INC., a corp., Appellee.

JUDGMENT—Filed and entered November 21, 1966

Appeal from the United States District Court for the Southern District of California, Central Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed and that this cause be and hereby is remanded to the said District Court for a new trial, with costs in this Court in favor of the appellant and against the appellee:

Costs:

Docket fee:	$ 25.00
Repro. costs;	151.71
Premium on bond:	100.00
Reporter's trans.	1960.00
Total:	$2236.71

[fol. 2111aa]

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Before: Jertberg and Ely, Circuit Judges, and Jameson, District Judge.

MINUTE ENTRY OF ORDER DENYING PETITIONS FOR REHEARING —January 12, 1967

On consideration thereof, and by direction of the Court, It Is Ordered that the petition of appellant filed on December 16, 1967, and the petition of the appellee filed on December 22, 1967, and within time allowed therefor by rule of Court, for a rehearing of above cause be, and hereby are denied.

[fol. 2111bb] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 2111cc]

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1966

SUNKIST GROWERS, INC., Petitioner,

vs.

CASE-SWAYNE CO., INC.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—April 12, 1967

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 1, 1967.

Wm. O. Douglas, Associate Justice of the Supreme Court of the United States.

Dated this 12th day of April, 1967.

[fol. 2111dd]

SUPREME COURT OF THE UNITED STATES

No. 1157, October Term, 1966

CASE-SWAYNE CO., INC., Petitioner,

v.

SUNKIST GROWERS, INC.

ORDER ALLOWING CERTIORARI—May 15, 1967

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

66

No. ~~1157~~

Office-Supreme Court, U.S.
FILED
MAR 17 1967
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

CASE-SWAYNE CO., INC., *Petitioner,*

v.

SUNKIST GROWERS, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

WILLIAM H. HENDERSON,
8510 16th St., No. 718,
Silver Spring, Maryland 20910.

W. GLENN HARMON,
703 Market Street, Suite 1400,
San Francisco, California 94103.
Attorneys for Petitioner.

J. EDWARD JOHNSON,
703 Market Street, Suite 1400,
San Francisco, California 94103.

RICHARD A. PERKINS,
202 So. Hamilton Drive, No. 700,
Beverly Hills, California 90211.
Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No.

CASE-SWAYNE CO., INC., *Petitioner,*

v.

SUNKIST GROWERS, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Case-Swayne Co., Inc., petitions for a writ of certiorari to review so much of the decision of the United States Court of Appeals for the Ninth Circuit entered in this case November 21, 1966, as holds that Sunkist Growers, Inc., is a co-operative organized in compliance with section 1 of the Capper-Volstead Act (as to which part of said decision a dissenting opinion was filed).

Opinions Below

The majority and dissenting opinions of the Court of Appeals (App. A, *infra,* pp. 19-44) are reported at 369 F. 2d 449. The District Court's Pre-Trial Order No. 1, dated April 22, 1964, involving the issue here presented, (App. B, *infra,* pp. 45-48) is unreported. Memorandum and Order Granting Motion For Directed Verdict (App. C, *infra,* pp. 49-57) is unreported.

Jurisdiction

The decision of the Court of Appeals was entered on November 21, 1966. On December 16, 1966, petitioner filed a timely petition for rehearing pursuant to Rule 23 of the Rules of the Court of Appeals for the Ninth Circuit. On December 22, 1966, Sunkist Growers, Inc. (hereinafter referred to as Sunkist) filed a petition for rehearing. On January 12, 1967, both of said petitions were denied by the Court of Appeals. We invoke the jurisdiction of the Supreme Court under 28 U.S.C. 2101 (c).

Statute Involved

Section 1 of the Capper-Volstead Act (7 U.S.C. 291) in pertinent part provides:

> "Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes . . . ."

Question Presented

Whether the majority of the Court of Appeals erred in holding that an incorporated association is duly organized under section 1 of the Capper-Volstead Act notwithstanding that approximately 15% of the association's members are not producers of agricultural products and not associations organized under said section but are profit making corporations.

Statement

Jurisdiction of the District Court was based on sections 1 and 2 of the Sherman Act and section 4 of the Clayton Act (15 U.S.C. 1, 2, and 15). (Complaint, Cl. Tr. 1-13).

On April 15, 1958, petitioner filed its complaint against Sunkist; the Exchange Orange Products Co. (hereinafter referred to as Exchange Orange) and Exchange Lemon Products Co. (hereinafter referred to as Exchange Lemon), alleging in part that these parties had combined and entered into contracts and conspired to restrain trade and have monopolized and attempted to monopolize the trade in product oranges grown in California and Arizona in violation of sections 1 and 2 of the Sherman Act, alleging damages in the sum of $800,000.00 and praying that the damages be trebled pursuant to section 4 of the Clayton Act (Cl. tr. 1-13).

On July 21, 1958, Sunkist, Exchange Orange and Exchange Lemon answered the complaint and (as relevant to this petition) alleged the affirmative defense that they were agricultural associations meeting the requirements of section 6 of the Clayton Act.[1] (15 U.S.C. 17) and section 1 of the Capper-Volstead Act (Cl. Tr. 155-170).

On October 31, 1958, Exchange Orange and Exchange Lemon merged into Sunkist. Sunkist assumed all the obligations of the merged corporations and pursuant to motion of Sunkist, Exchange Orange and Exchange Lemon were dismissed from the action (Cl. Tr. 222-229; 611-12; Pl's Exh. 1A).

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[1] The Capper-Volstead Act made the provisions of section 6 of the Clayton Act applicable to "associations" such as Sunkist, Exchange Orange and Exchange Lemon having capital stock. The issues raised by section 6 of the Clayton Act have been deemed embraced within the issues raised by the Capper-Volstead defense. *United States* v. *Borden Co.*, 308 U.S. 188 (1939); *Maryland & Virginia Milk Producers Ass'n, Inc.* v. *United States*, 362 U.S. 458 (1960).

In April, 1961, the parties presented to the Court a stipulation of facts relating to the defense of section 1 of the Capper-Volstead Act, hereinafter referred to as the Capper-Volstead stipulation. The stipulation was filed October 27, 1964 (Cl. Tr. 1790-1804).

On June 29, 1962, petitioner filed a supplemental complaint pleading transactions occurring since the date of the original complaint and alleging additional damages from April 15, 1959 to January 31, 1962, in the sum of $1,412,000 (Cl. Tr. 1078-1083).

At a hearing, March 2, 1964, the parties stipulated that the facts as stipulated to in the Capper-Volstead stipulation were in all material respects the same except for the merger of Exchange Orange and Exchange Lemon into Sunkist (October 31, 1958) and applied to the entire period of the action (Cl. Tr. Vol. A, 25A-26A).

On April 23, 1964, the Court signed Pre-Trial Order No. 1. The District Court ruled therein that Sunkist, Exchange Orange and Exchange Lemon had complied with section 1 of the Capper-Volstead Act, and consequently a conspiracy in violation of the Sherman Act could not exist solely between Sunkist, Exchange Orange and Exchange Lemon, and ordered two separate trials, the first to cover the issue of liability and, if the petitioner prevailed, the second to cover the issue of damages. (App. B, *infra*, pp. 45-48, Cl. Tr. 1307-1310). On May 26, 1964, in pretrial order No. 2, the Court ordered the issues in the action confined to whether Sunkist had a monopoly on oranges grown in California and Arizona, whether it had illegally used such monopoly power or had attempted to monopolize such oranges, and damages (Cl. Tr. 1359-60).

Exchange Orange was a 100 percent owned subsidiary of Sunkist. Exchange Lemon's membership was composed the same as Sunkist's membership. (Paragraphs 7 and 8

Capper-Volstead Stipulation, Cl. Tr. 1794-1795. See also the Supreme Court's decision in *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 370 U.S. 19 at p. 22, hereinafter referred to as the *Winckler* case.) Thus, Exchange Orange and Exchange Lemon would fall with Sunkist. Therefore, in further discussion of the membership requirements of an association under section 1 of the Capper-Volstead Act we refer only to the composition of Sunkist's membership.

Trial was had. Sunkist, without offering evidence, moved for a directed verdict. On March 2, 1965, a final judgment was entered pursuant to the Court's "Memorandum and Order Granting Motion For Directed Verdict" (App. C, *infra*, pp. 49-57. 5 Cl. Tr. 1964-1966; 2093-2104; 2110-11).

On November 21, 1966, the Court of Appeals reversed the judgment of the District Court and held that petitioner had made a prima facie case for the jury that Sunkist had wrongfully exercised monopoly power and had intentionally attempted to monopolize the trade in product oranges in the California-Arizona market. *But*, one judge dissenting, the Court of Appeals held that the District Court had correctly ruled that Sunkist had complied with section 1 of the Capper-Volstead Act, the issue we are here concerned with. (App. A, *infra*, pp. 19-44).

The facts relevant to the Capper-Volstead issue are as follows:

Sunkist obtained 95.28 percent of its fruit from its citrus packing house members hereinafter referred to as packing houses. The fruit *growers* were not Sunkist members except for certain "corporate growers" who had sufficient volume to operate their own packing houses and who supplied the remaining 4.72 percent of fruit handled by Sunkist (Para. 3, Capper-Volstead Stip. Cl. Tr. 1793).

The packing houses we are here concerned with are those

denominated "*agency associations*" in the Capper-Volstead stipulation (See para. 4, Capper-Volstead Stip. Cl. Tr. 1793-1794).

To prevent confusion it should be kept in mind that Sunkist in its 1955 Sunkist-District Exchange-Association Agreement with the packing houses (Exh. A to Capper-Volstead Agreement, Cl. Tr. 1805-1820) and in its Amended Articles of Incorporation and By-laws after the October 31, 1958 merger (Plf's Exh. 1A) refers to the packing houses collectively as "associations" even though the so-called "*agency associations*" (the packing houses we are concerned with) are *not* fruit growers, *not* associations of growers, but profit-making enterprises.

When this suit was filed (April 15, 1958) and until October 31, 1958, the packing houses derived their Sunkist membership from their association with District Exchanges (Paragraphs 5 and 6 Capper-Volstead Stip. Cl. Tr. 1794; Article XII, Sunkist's Articles of Incorporation Cl. Tr. 1837; opening paragraph and paragraph 2 Exh. A to Capper-Volstead stipulation Cl. Tr. 1807. See also the *Winckler* case, 370 U.S. at p. 21). After the merger of October 31, 1958, the packing houses were *specifically designated members* of Sunkist (Article 2.2, p. 4 "Sunkist's Amended Articles of Incorporation and By-Laws", Plf's Exh. 1A).

The function of the packing houses in the Sunkist system was to enter into agreements with growers for delivery of grower's fruit to the packing houses, pick the fruit (after the grower had brought it to the point where it is ready to pick), wash, grade, and market it through Sunkist (Capper-Volstead Stip. Cl. Tr. 1799: 22-27; para. 23 of Exh. A. to the Stip. Cl. Tr. 1813 (the 1955 Sunkist-District Exchange Association Agreement, page 9); Article 2.3 p. 4 "Sunkist's Amended Articles of Incorporation and By-Laws", Plf's Exh. 1A).

The "make-up" of Sunkist's agency "association" members was stipulated to in paragraph 4 of the Capper-Volstead Stip. (Cl. Tr. 1793: 22-27)"

> "4. *Agency Associations.* Agency associations constitute 14.91% by number and 12.94% by volume of all associations in the Sunkist system. The agency association is normally a private corporation which owns and operates packing house facilities. Some "agency associations" are individually owned enterprises and partnerships . . . Such agency associations do not qualify as, nor do they claim to be, cooperative associations under section 1 of the Capper-Volstead Act."

The "agency associations" are not fruit growers. They purchase the oranges they market through Sunkist from growers for the consideration of "cost plus a fixed fee" per box of oranges. Hence, the agency association does not itself participate in either gain or loss involved in marketing through Sunkist beyond the recovery of its costs and fixed fee for marketing (Capper-Volstead Stip. Cl. Tr. 1793-1794; Exh. B to said stipulation which is "a contract between such an agency association and its growers which may be deemed as typical of such associations", Cl. Tr. 1793-1794; 1821-1822).

Reasons for Granting the Writ

I

The issue of whether the membership of a cooperative[2] must be "farmers" or (as pertinent to the instant case) "fruit growers" or associations composed of fruit growers, we believe to be one of original impression. We do not believe it has ever before been questioned but that the pro-

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[2] Hereinafter we use the term "cooperative" as referring to an association organized in compliance with Sec. 1 of the Capper-Volstead Act.

visions of section 1 of the Capper-Volstead Act mean what they say—Members of cooperatives must be "producers of agricultural products" as "farmers" or "fruit growers." The question has not been but should be settled by this Court. Particularly is this so when the Court of Appeals *misread* this Court's decision, in the *Winckler* case *as* settling it and unless reversed will annul the provisions of Section 1 prescribed by Congress limiting membership of cooperatives to producers of agricultural products. Organizers of cooperatives doing billions of dollars of business in competition with individual enterprise will so rely on the Court of Appeals decision.

Both the District Court and the majority of the Court of Appeals misinterpreted the Supreme Court's decision in the *Winckler* case on the issue. Both relied upon the *Winckler* case as holding that Sunkist was an association meeting the requirements of section 1 of the Capper-Volstead Act.

On March 2, 1964, the District Court in its oral pronouncement on the issue (upon which pronouncement Pre-Trial Order No. 1, drafted by Sunkist, was based) stated with respect to the Capper-Volstead issue:

> The Court: "I tell you frankly that I am not going into that issue in this case. I am going to rely upon the *Winckler* case . . ." (R. Tr. 22A:16-23).

> The Court: "Yes. I have overruled the objcetions. *I don't know how it came up now and how the issue was raised,* but I am going to rule that they have complied." (R. Tr. 45A:16-18) (Our emphasis)

When the District Court asked Sunkist's counsel:

> "Don't you think that that issue was disposed of in the *Winckler* case by the Supreme Court"—he replied: "We believe the Court is absolutely correct." (R. Tr. 24A:6-15).

The majority of the Court of Appeals in its decision (App. A, *infra*, p. 36) stated:

> "The District Court concluded, and we think correctly, that under the decision of the Supreme Court in Sunkist Growers, Inc. v. Winckler & Smith Co., supra, Sunkist Growers, Inc., is a cooperative organized in compliance with Section 1 of the Capper-Volstead Act. It is true, as appellant argues, that this issue was not specifically raised in the Winckler case, but the Court did describe the Sunkist organization in detail."

The Supreme Court in the *Winckler* case did *not* hold that Sunkist was a cooperative organized in compliance with section 1 of the Capper-Volstead Act. *Winckler* CONCEDED that Sunkist was such a cooperative.

The dissenting member of the Court of Appeals stated:

> "The principal reason offered by the majority in support of the view which I question is its asserted belief that the question was settled in *Sunkist* v. *Winckler & Smith Co.*, 370 U.S. 19, 8 L Ed. 2d 305, 82 Sup. Ct. 1130 (1062). I do not so interpret that decision. The particular issue was not presented to the Supreme Court, and it was not adjudicated. It was apparently conceded by the parties in *Winckler*, of which the appellant here was not one, that Sunkist was covered by the Capper-Volstead exemption. In the prior opinion of the Court of Appeals, reported at 284 F.2d 1 (9th Cir. 1960), the only discussion of the exemption pertained to its extent, not to whether or not it was applicable. Furthermore, the Supreme Court in granting certiorari, 368 U.S. 813 (1961), expressly limited its consideration to a single question, namely,
>
> 'Where a group of citrus fruit *growers* form a cooperative organization for the purpose of collectively processing and marketing their fruit, and carry out those functions through the agency of three cooperative agricultural associations, each of which is basically *wholly owned and governed by those growers*,

> *and each of which is admittedly entitled to the exemption from the antitrust laws accorded to agricultural cooperatives by the Capper-Volstead Act* (7 U.S.C.A., sec. 291)—is an unlawful conspiracy, combination or agreement established under Sections 1 and 2 of the Sherman Act upon proof only that these *growers*, through the agency of these three cooperatives, *agreed among only themselves* with respect to the extent of the division of the function of processing between them or with respect to the price they would charge in the open market for the fruit and the by-products thereof processed and marketed by them?' (Emphasis supplied.)'' (App. A, *infra*, pp. 40-41)

(See also quotations from briefs to this Court in the *Winckler* case, *infra*.)

The issue decided by this Court in the *Winckler* case involved Sunkist's contention that "Sunkist, Exchange Orange, and Exchange Lemon being made up of the same growers of associations, cannot be charged with conspiracy among themselves." (370 U.S. at p. 20). This Court construed that the District Court's instructions "quite plainly left it open for the jury to base their verdict upon a finding of a conspiracy among petitioners [Sunkist and Exchange Orange] and Exchange Lemon" (370 U.S. at p. 25). It stated: "We are squarely presented, then, with the question of whether Sunkist, Exchange Orange and Exchange Lemon —the three legal entities formed by these 12,000 growers— can be considered independent parties for the purposes of §§ 1 and 2 of the Sherman Act." It held: "We conclude not." (370 U.S. 27).

We submit: That is *what* this Court held respecting section 1 of the Capper-Volstead Act and that is *all* this Court held.

The majority of the Court of Appeals (App. A, *infra*, pp.

36, 37) quoted and relied upon a statement by the Supreme Court in the *Winckler* case that "the language of the Capper-Volstead Act is specific in permitting concerted efforts by farmers" and that "the legislative history of the Act reveals several references to the Sunkist organization" including a suggestion by Senator Capper that this was a type of cooperative that would find "definite legalization under the legislation." (370 U.S. 28). The Supreme Court's statement was made solely with reference to its holding that Sunkist, Exchange Orange and Exchange Lemon could not be considered independent parties under the conspiracy provisions of the Sherman Act.

This Court's statement and reasoning is entirely consistent with its statement in the *Milk Producer's* case (362 U.S. at p. 466) that the House Report on the Capper-Volstead Act indicated "a purpose to make it possible for *farmer producers* to organize together "for the purposes of the act" (Our emphasis). It was "the concerted efforts by *farmers*" (our emphasis) that was held to be unobjectionable in the *Winckler* case. This Court's reasoning also accords with its decision in the *Borden* case where it ruled that a cooperative violated section 1 of the Sherman Act when it conspired with non-cooperatives to fix milk prices. (It would seem inconsistent for cooperatives to have nonproducer of agricultural products as members when members of cooperatives may associate to fix prices of products they produce.) The dissenting judge pointed out "that, while there are no decisions" on the issue, the language of this Court in the *Borden* case and the *Milk Producers* case (quoted by the dissenting judge) supported his conclusion that it is "plainly required" by the terms of section 1 of the Capper-Volstead Act that members of cooperatives be producers of agricultural products. (App. A, *infra*, pp. 42-44)

The majority of the Court of Appeals also states (App. A, *infra*, p. 38):

> "Associations organized under the Capper-Volstead Act 'may make the necessary contracts and agreements to effect' the purposes of the Act, i.e., 'collectively processing, preparing for market, handling, and marketing' their products. (7 U.S.C. 291). The agency associations supply services which the growers require (packing house facilities) in handling and marketing their products. The fact that the *'packing is done by local associations* * * * and the processing by separate organizations' does not preclude the growers from being considered one association for purposes of the Capper-Volstead Act. Sunkist Growers, Inc. v. Winckler & Smith Co. supra." (Our emphasis.)

Again, the quotation from the *Winckler* case related to the Supreme Court's ruling that cooperatives organized by the same grower associations may be deemed one cooperative. The quoted provision of section 1 that associations may make the necessary agreements to effect the purposes of the act would appear to refer only to agreements between the association and its *members*. But—assuming the provision authorizes such agreements with *nonmembers:* As is stated by the dissenting Judge of the Court of Appeals (App. A, *infra*, p. 42, footnote 1):

> "The stipulation [Capper-Volstead stipulation] does *not* say that the associations were independent contractors. It recites that they were *'members'* of the Sunkist system. If the association were truly separate and independent, then that determination should be made, in the first instance, by the District Court. If they were not 'members' of the Sunkist system, then, as I see it, the exemption of the Capper-Volstead Act

is irrelevant to the issue of the propriety of Sunkist's dealing with them. *United States* v. *Borden Co., supra.*" (Emphasis, dissenting judge.)

II

Even if the Supreme Court in the *Winckler* case *had* held that Sunkist was organized in compliance with Sec. 1 of the Capper-Volstead Act, its decision would be neither binding nor precedent here. As the dissenting Judge of the Court of Appeals states:

> "Even if the issue had been determined by the Supreme Court in *Winckler,* the admitted nature of Sunkist's present organizational make-up is such that the exemption should no longer be held properly to apply. The privilege to act together in 'exempt' associations is conferred only upon 'persons engaged in the production of agricultural products . . . .' 7 U.S.C. § 291. The plain import of the statutory language is that such an association must be composed *solely* of agricultural producers. Regardless of whether Sunkist was thus composed at the time of the *Winckler* decision in 1962, as the Supreme Court's order granting certiorari, *supra,* indicates, it is clear that *the composition is no longer the same.* In our case, it is conceded that the so-called 'agency associations,' which comprise almost 15% of the membership of the Sunkist organization, are *not* growers or producers." (App. A, *infra,* pp. 41, 42; our emphasis.)

Further: The composition of Sunkist's membership in the *Winckler* case as it appears from the briefs to this Court and from this Court's decision in that case was that *all* Sunkist's packing house members were associations composed of fruit growers. On pages 5 and 6 of Sunkist's brief to this court in the *Winckler* case (filed February 7, 1962) Sunkist stated:

> "*Each of these corporate entities* [Sunkist, Exchange Orange and Exchange Lemon] *handles only the fruit of Sunkist grower-members.* . . . . Each of them complies in all respects with the organizational and other conditions prescribed by the Capper-Volstead Act for immunity from the sanctions of the antitrust laws in respect of such collective processing, handling and marketing of agricultural products. Indeed, that they do so comply was conceded below by all concerned. . . . *At the base of the Sunkist system are the individual growers. It is their fruit, and only their fruit, that is handled by Sunkist.* It is they who control and manage all components of the Sunkist cooperative organization. *The individual growers have organized into local associations.* . . ." (Our emphasis.)

The respondent Winckler did not challenge Sunkist's description of the Sunkist system. To the contrary, on page 7 of its brief to this court (filed March 7, 1962), Winckler stated:

> "With a few additions deemed essential to an adequate factual presentation, respondents accept petitioner's description of the organization and functions of the constituent elements of the so-called Sunkist system of cooperatives."

This Court appears to have accepted these representations that *All* of Sunkist's packing house members were composed of *grower associations.*

> "Sunkist Growers, Inc., has at its base 12,000 growers of citrus fruits in California and Arizona. *These growers are organized into local associations which operate packing houses."* (Emphasis supplied) (370 U.S. at p. 21).

* * * * * * *

"In sum, *the individual growers involved each belong to a local grower association.*" (Our emphasis.) (370 U.S. at p. 22).

Whatever may have been the situation in the *Winckler* case (where it was unchallenged that all the packing houses were grower associations) it is clear from the record in *this* case that approximately 15% of Sunkist's packing house *members* supplying approximately 13% of Sunkist's fruit were *not* fruit growers, *not* associations of fruit growers but profit making corporations.

III

In discussion following, we refer to certain publications of the Department of Agriculture which documents the Court may judicially notice.[3]

Agricultural cooperatives whose members join together and fix prices of their products and who enjoy tax and financing advantages not accorded profit making enterprises are numbered in the thousands and market billions of dollars of products. Their volume of business is on the increase. They compete with private corporations at all levels of trade.

The tax and financial advantages accorded cooperatives is illustrated on pp. 19-22 of U. S. Department of Agriculture FCS Bulletin 1 "Farmer Cooperatives in the United States" (App. D, *infra*, pp. 58, 61, 64-69).

The U.S. Department of Agriculture publication "Statistics of Farmer Cooperatives—1963-64" (p. 2) shows that the marketing volume of cooperatives marketing farm products increased from approximately $8 billion in the year

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[3] *Tempel* v. *United States*, 248 U.S. 121 (1918); *Atlantic Transport Co. of West Virginia* v. *Rosenberg Bros. & Co.*, 34 F.2d 843 (9th Cir. 1929); *Interstate Natural Gas Co.* v. *Southern California Gas Co.*, 209 F.2d 380 (9th Cir. 1953). For the Court's convenience the particular pages of the documents referred to in the discussion are reproduced in Appendix D.

1950-51 to over $14½ billion in the year 1963-64. (App. d, *infra,* pp. 70-71). And (p. 16 of such publication) that the number of such cooperatives during the period ranged from 6,519 in the year 1950-51, to 5,421 in the year 1963-64. Mergers accounted in part for the decrease in the total number of cooperatives. (App. D, *infra,* pp. 73-76).

It appears that the Department of Agriculture has never questioned but that section 1 of the Capper-Volstead Act means what it says: Members of Cooperatives must be composed of producers of agricultural products or (as in this case) associations composed of such producers.

In FCS Bulletin 1—*Farmer Cooperatives in the United States* it is stated (p. 15):

> "For an agricultural cooperative to come within the Capper-Volstead Act, *it must be composed of* 'persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or *fruit growers.*" (Our emphasis, App. D., *infra,* p. 60)

In the U. S. Department of Agriculture FCS Circular 18, November 1956, *"Organizing A Farmer Cooperative",* in suggested Bylaws of organization forms, the qualifications of members are stated (p. 23) in part, as:

> "Section 1. *Qualifications.* Any person, firm, partnership, corporation or association, *who is a bona fide producer of agricultural products . . .*" (Our emphasis, App. D., *infra,* pp. 77, 79).

Sunkist's operations constitute an Exhibit A example of a mammoth combination illegally taking advantage of privileges intended only for bona fide cooperatives and competing on different trade levels with profit-making enterprises.

During the years involved in this action (year 1954-5 to year 1961-2) Sunkist's average control of oranges was approximately 70% of all produced in the California-Arizona

market. Total oranges produced in the market during this period ranged from 24½ million boxes in the year 1957-58 to over 40½ million boxes in the year 1954-55. (Plf's Exh. 92). The Sunkist dollar value of oranges controlled by it during this period ranged from $99½ million, in the year 1954-55 to over $117½ million in the year 1957-58. (Plf's Exh. 97) Sunkist's total sales for the year 1957-58 were $183 million. (Re. Tr. 1104-1105, Plf's Exh. 112).

Sunkist's marketing of product oranges (the oranges involved in this action) was vertically integrated with dual distribution. It sold products in competition with manufacturers of orange products who purchased orange supplies from Sunkist. (General Foods, Re. Tr. 543:4-10; 549:12-550:3; Hyland-Stanford Co., Re. Tr. 513:12 to 514:6; Tree-Sweet, Re. Tr. 345:2-22; 706:13-25; Case-Swayne Co., Plf's Exhs. 131, 132, Re. Tr. 792:6-13; 823:3-17).

Sunkist's hundreds of extremely diversified orange products (sold in competition with products of private enterprises) included such items as "juices, concentrates, oil, pectin, pharmaceuticals and cattle feed." *Winckler* case, 370 U.S.C. at p. 21, footnote 1.

Conclusion

This petition is based upon the following considerations:

I

The case presents a new and major question of law which the courts have not authoritatively resolved and which this court should resolve.

II

The majority of the Court of Appeal's *misreading* of this Court's decision in the *Winckler* case is calculated to cause lawyers, businessmen, cooperative organizers and others to mistake the Court of Appeal's ruling as one based on a

ruling by the Supreme Court that profit making enterprises that do not produce agricultural products may be members of cooperatives.

III

The majority of the Court of Appeals failed to apprehend that the "make-up" of Sunkist's packing house membership in this case (where it included profit making enterprises that were not producers of agricultural products) was *not* the same as it appeared to be in the *Winckler* case (where it was unchallenged that the packing houses were *all* grower associations).

IV

The tremendous importance of the question presented is illustrated by the role played by cooperatives in our national economy. Thousands of cooperatives (enjoying limited antitrust immunity and tax advantages) do billions of dollars of business in competition with individual enterprise at all levels of trade.

The petition for writ of certiorari should be granted.

Respectfully submitted,

WILLIAM H. HENDERSON,
W. GLENN HARMON,
by —— —— —— ——

J. EDWARD JOHNSON,
RICHARD A. PERKINS.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 20,070

CASE-SWAYNE CO., INC., a corporation, *Appellant*,

vs.

SUNKIST GROWERS, INC., a corporation, *Appellee*.

[November 21, 1966]

On Appeal from the United States District Court for the Southern District of California, Central Division

Before: JERTBERG and ELY, Circuit Judges, and JAMESON, District Judge.

JAMESON, District Judge:

This is an action seeking treble damages under section 4 of the Clayton Act (15 U.S.C. § 15) [1] for alleged monopoly and attempt to monopolize in violation of sections 1 and 2 of the Sherman Act (15 U.S.C. § 1, 2).[2] The district court

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[1] 15 U.S.C. § 15 provides:

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

[2] 15 U.S.C. § 1 provides in part:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: * * *"

* * * * * * *

Section 2 provides in part:

"Every person who shall monopolize, or attempt to monopolize, or

granted the defendant's motion for a directed verdict at the close of plaintiff's case.[3]

Plaintiff (appellant), Case-Swayne, Inc., is engaged in the manufacture of single strength juices (canned orange juice and blends of orange juice with other fruit juice) as an independent operator. Defendant (appellee), Sunkist Growers, Inc., is an association of citrus producers.[4] It has as its base 12,000 citrus growers in Southern California and Arizona. The growers are organized into local associations which operate packing houses. The associations in turn are grouped into district exchanges and representatives from the exchanges make up the governing board of Sunkist. The Sunkist organization handles its members' fruit in effect from tree to store.

Appellant contends that the district court erred (1) in granting the defendant's motion for a directed verdict; and (2) in ruling that Sunkist was organized in conformance with section 1 of the Capper-Volstead Act[5] and therefore could not be held in violation of section 1 of the Sherman

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combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor * * *."

[3] At the close of plaintiff's case, the defendant moved for dismissal under Rule 41(b) F.R. Civ. P. or for a directed verdict under Rule 50(a). The court first indicated that it would dismiss pursuant to Rule 41(b), but later concluded that the motion for dismissal was improper and granted defendant's motion for a directed verdict under Rule 50(a).

[4] In addition to Sunkist Growers, Inc., the complaint named Exchange Orange Products Company and Exchange Lemon Products Company as defendants. Subsequently Exchange Orange and Exchange Lemon merged into Sunkist Growers, Inc., which assumed all of the obligations of the merged corporations, and the action was dismissed as to Exchange Orange and Exchange Lemon.

[5] Section 1 of the Capper-Volstead Act (7 U.S.C. 291) provides that, "Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purpose: * * *."

Act for conspiracy to restrain and monopolize trade in product oranges. If Sunkist Growers, Inc., was in fact organized as an agricultural cooperative association pursuant to the Capper-Volstead Act, as the district court found, any interorganizational dealings among the various agricultural cooperative associations are immune from the conspiracy provisions of section 1 of the Sherman Act;[6] but Sunkist may still be found liable under section 2 of the Sherman Act for wrongful use of monopoly power and attempt to monopolize.[7] The question presented under the first specification in error is whether the evidence was sufficient for the jury to find that Sunkist wrongfully used monopoly power or attempted to monopolize trade in product oranges.

In ruling on a motion for a directed verdict the trial court is required to view the evidence in the light most favorable to the party against whom the motion is made. "On appeal, likewise, the appellate court must consider the evidence in its strongest light in favor of the party against whom the motion * * * was made, and must give him the advantage of every fair and reasonable intendment that the evidence can justify". 5 Moore's Federal Practice 2316 (2d.ed. 1951). This is true "even though contrary inferences might reasonably be drawn". Continental Ore Co. v. Union Carbide, 1962, 370 U.S. 690, 696, 82 S.Ct. 1404, 8 L.Ed. 2d 777.

Sunkist controlled approximately 70% of all oranges produced in Southern California and Arizona, and approximately 67% of the oranges diverted to product use. Product or "excess" oranges are those not sold as fresh fruit. They are used to make various orange products and are the only kind used by plaintiff in its business. On a national basis Sunkist controlled 6 to 7% of the total production.

Other small cooperatives controlled for their own use approximately 18% of the oranges grown in Southern Cali-

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[6] See Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., 1962, 370 U.S. 19, 82 S.Ct. 1130, 8 L.Ed.2d 305.

[7] See Maryland & Virginia Milk Producers Ass'n, Inc. v. United States, 1960, 362 U.S. 458, 80 S.Ct. 847, 4 L.Ed.2d 880; Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., supra.

fornia and Arizona. The balance of the oranges, approximately 12%, represented those grown by independent growers and available to independent manufacturers.

Additional facts set forth in the order granting defendant's motion for directed verdict include the following:[8]

(1) Prior to the development of the citrus juice industry there was no market for fruit not required by the fresh fruit market, and the remainder of the fruit, then called "culls", was destroyed by the packing houses. With the development of the citrus juice industry, the demand for culls, now designated "excess fruit", could be sold to processors to convert into juiece and other by-products.

(2) At the beginning of its processing activity plaintiff had no difficulty in obtaining at a reasonable price sufficient fruit for its needs. When it was demonstrated that conversion of excess fruit into juice and other citrus by-products was profitable, Sunkist decided to process its own fruit and for that purpose organized Exchange Orange Products Company and Exchange Lemon Products Company.

(3) Fruit not so processed was sold to independent processors, including plaintiff. Sunkist had excess fruit available for sale to independent processors only when it was unable to process its own fruit. For several years Sunkist sold its excess fruit to independent processors by a bid system. All independent processors, including plaintiff, were invited to present bids for fruit to be sold.

(4) As time went on and as Exchange Orange and Exchange Lemon developed processing capabilities, more and more excess fruit from Sunkist packing houses was channeled to Exchange Orange and Exchange Lemon until, at the present time, practically no Sunkist fruit is sold to independent processors.

(5) Plaintiff attempted to obtain from other mutual citrus associations its requirement of fruit to process, only to find that such associations had entered into individual con-

[8] All of the facts are substantially in the language of the district court, although they do not appear in the court's order in the same sequence.

tracts with other processors; hence plaintiff was able to obtain very little fruit supply from mutual associations.

(6) Approximately 12,000 citrus fruit growers annually signed contracts with Sunkist agreeing to sell fruit through the Sunkist organization. The contracts provided that if a grower did not abide by his contract, sanctions might be imposed. Occasionally a grower failed to sell his fruit to Sunkist, and sanctions were imposed by the Sunkist organization.

(7) Sunkist trade-mark or trade name was a valuable asset, and defendant had spent large sums in establishing its trade-mark or trade name.

(8) Sunkist employees observed operations of member growers to make certain that the growers handled their crops through the Sunkist organization and if it was discovered that a member grower sold fruit contrary to his contract ,a report was made to Sunkist and, in certain instances, penalties were imposed upon the violating grower.

(9) The Department of Agriculture, pursuant to the school lunch program, requested bids for single strength orange juice. One year Sunkist bid but did not receive the contract and another year, Sunkist bid and was awarded the contract.

(10) Sunkist made a large profit from sale of citrus fruit.

(11) The great majority of citrus grown in Southern California and Arizona goes into the fresh fruit market. The greater amount of oranges grown in Florida goes into the citrus products market. Fresh fruit from California, Arizona and Florida compete on the eastern and foreign markets.

(12) It was possible for processors in Florida to make single strength orange juice, can and ship it to California, and sell it at the same price as (or at a price lower than) the Southern California-Arizona produced juice. Florida processors of single strength orange juice could assimilate transportation costs from Florida to California and sell their product in competition with single strength orange juice made within the Southern California-Arizona area. This was possible because of the lower price for which Florida fruit could be purchased.

(13) The price paid for Florida oranges was the dominant factor in determining the price for which single strength orange juice could be sold to the ultimate consumer.

(14) There is also competition between single strength orange juice and orange juice concentrates. Neither of the parties is a producer of concentrated or frozen juice.

The alleged violations of the Sherman Act arise out of "Sunkist's dominant control of oranges grown in Arizona and California together with its vertical integration and dual distribution with respect to oranges designated for product use . . .". More particularly, plaintiff complains that it was unable to purchase oranges for product use from Sunkist at a price that would enable it to compete with canned juice shipped in from Florida.[9]

The district court's granting of the directed verdict was premised upon the conclusioin that the "relevant market" was national rather than limited to California-Arizona, and that in light of this plaintiff had not shown evidence of an illegal monopoly.[10]

The cases uniformly hold that "a party has monopoly power if it has over 'any part of the trade or commerce among the several states', a power of controlling prices or unreasonably restricting competition". United States v. du Pont & Co., 1956, 351 U.S. 377, 389, 76 S.Ct. 994, 100 L.Ed. 1264. In determining whether a party has monopoly power it is first essential to define the "relevant market".

This court has held that determination of the relevant market, "both as respects products and as concerns geographical area" is a "necessary step precedent to determining whether within that market there was a probability" of violation of section 7 of the Clayton Act. Crown Zellerbach

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[9] This is not a complete statement of the alleged monopolistic acts of Sunkist, but it is the act upon which plaintiff places the most emphasis.

[10] The district court initially was of the opinion that the relevant market was Southern California and Arizona, but concluded, when all of the evidence was presented, that the relevant market for product oranges was a national market, "and that whatever happened in Florida directly affected prices in California and vice versa. Prices paid for oranges in California depended substantially upon the price for which oranges were sold in Florida".

Corporation v. F.T.C., 1961, 296 F.2d 800, 804, (cert. denied (1962)) 370 U.S. 937, 82 S.Ct. 1577, 8 L.Ed.2d 806. While Crown Zellerbach involved a violation of the Clayton Act with respect to corporate acquisitions, it is clear that the same determination must be made regarding the relevant market in actions for violation of section 2 of the Sherman Act. United States v. du Pont & Co., supra.

In the recent case of United States v. Grinnell Corp., 1966, 384 U.S. 563, —— S.Ct. ——, —— L.Ed.2d ——, a civil suit for alleged violations of section 2 of the Sherman Act, the Court said in part:

> "* * * That * * * case arose under § 7 of the Clayton Act where the question was whether the effect of a merger 'in any line of commerce' may be 'substantially to lessen competition.' We see no reason to differentiate between 'line' of commerce in the context of the Clayton Act and 'part' of commerce for purposes of the Sherman Act." (384 U.S. at 573).

In determining the "relevant market" applicable in this case, it seems advisable first to analyze separately the factors involved in both the relevant *product* market and the relevant *geographic* market.

Relevant Product Market

United States v. du Pont & Co., supra, relied upon by the district court in granting Sunkist's motion for a directed verdict, promulgated the test of "reasonable interchangeability" to determine the relevant product market. The Government contended that cellophane was the relevant product market. The Court assumed that if this were true, du Pont would have monopoly power over that market. The Court found, howevevr, that cellophane was "reasonably interchangeable" with other flexible wrappings ,and that the relevant product market accordingly was "flexible packaging materials" rather than cellophane alone.

The rule of "reasonable interchangeability" has been refined and modified in subsequent cases. In particular, the courts have recognized that there may be an outer market and one or more inner submarkets within which competitive

effects are to be appraised, i.e. a relevant submarket may constitute the product market for antitrust purposes.

In Brown Shoe Co. v. United States, 1962, 370 U.S. 294, 82 S.Ct. 1502, 8 L.Ed.2d 510, involving a merger found to be in violation of section 7 of the Clayton Act, the Court said in part:

> "The 'area of effective competition' must be determined by reference to a product market (the 'line of commerce') and a geographic market (the 'section of the country').
>
> "The Product Market
>
> "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes. (citation) The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." (370 U.S. at 324-5).

The rule of Brown Shoe was expressly applied to cases arising under section 2 of the Sherman Act in the recent case of United States v. Grinnell Corporation, supra, where the Court esaid:

> "In § 2 cases under the Sherman Act, as in § 7 cases under the Clayton Act (Brown Shoe Co. v. United States, 370 U.S. 294, 325) there may be submarkets that are separate economic entities." (384 U.S .at 573).

Relevant Geographic Market

In Brown Shoe, supra, the Court also set forth criteria to be used in determination of the geographic market:

"The Geographic Market

"The criteria to be used in determining the appropriate geographic market are essentially similar to those used to determine the relevant product market. See S. Rep. No. 1775, 81st Cong. 2d Sess. 5-6; United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586, 593. Moreover, just as a product submarket may have § 7 significance as the proper 'line of commerce', so may a geographic submarket be considered the appropriate 'section of the country.' (Citing cases). Congress prescribed a pragmatic, factual approach to the definition of the relevant market and not a formal, legalistic one. The geographic market selected must, therefore, both 'correspond to the commercial realities' of the industry and be economically significant. Thus, although the geographic market in some instances may encompass the entire Nation, under other circumstances it may be as small as a single metropolitan area." (370 U.S. at 336-7).

In the recent case of United States v. Pabst Brewing Company, et al., 1966, 384 U.S. 546, 552 —— S.Ct. ——, —— L.Ed.2d ——, involving the acquisition in 1958 by Pabst Brewing Company of Blatz's Brewing Company, the Court held that the "evidence as to the probable effect of the merger on competition in Wisconsin, in the three-state area (Wisconsin, Illinois and Michigan), and in the entire country was amply sufficient to show a violation of § 7 (of the Clayton Act as amended by the Celler-Kefauver Anti-Merger Amendment) [11] in each and all of these three areas". In 1957, prior to the merger, the two companies had combined sales which accounted for 23.95% of the beer sales in Wisconsin, 11.32% of the sales in the three-state area, and 4.49% of the sales throughout the country.

[11] 38 Stat. 731, as amended, 64 Stat. 1125, 15 U.S.C. § 18 (1964 ed.)

The Court was unanimous in holding that the district court erred in dismissing the complaint. Mr. Justice Harlan (joined by Mr. Justice Stewart) in a concurring opinion agreed with the district court that viewing the entire continental United States as a relevant market, the evidence did no sustain the Government's contention that the acquisition might substantially lessen compeition. They agreed with the majority opinion, however, as did Mr. Justice Fortas, that the Government's evidence was sufficient to establish prima facie that Wisconsin and the tri-state area were proper "sections of the country" in which to measure the probable effects of the acquisition.

In his concurring opinion, Mr. Justice Harlan said in pertinent part:

> "The appropriate geographic area in which to examine the effects of an acquisition is an area in which the parties to the merger or acquisition compete, and around which there exist economic barriers that significantly impede the entry of new competitors. * * *" (384 U.S. at 556-7).

Whether a geographical location is or is not an "area of effective competition" is a question of fact in each case. United States v. Columbia Pictures Corporation, S.D. N.Y., 1960, 189 F.Supp. 153, 192. The area may be limited by differences in costs of production and transportation. Erie Sand & Gravel Co. v. F.T.C., 3 Cir. 1961, 291 F.2d 279, 281. "A competitive price disadvantage arising from transportation costs is an important factor in determining the scope of a relevant market". United States v. Penn-Olin Chemical Company, D. Del., 1963, 217 F.Supp. 110, 120; American Crystal Sugar Co. v. Cuban-American Sugar Co., S.D. N.Y., 1957, 152 F.Supp. 387, 398, Aff'd 2 Cir. 1958, 259 F.2d 524.

It seems clear from the decided cases that (1) while the outer limits of the market may be determined by the competition of interchangeable products, (2) there may be a well-defined submarket which constitutes the relevant market for antitrust purposes, which (3) must correspond to the commercial realities of the industry, (4) is affected by price

disadvantages due to transportation costs, (5) is affected by availability of a buyer to supply and existence of economic areas which significantly impede competition, (6) is determined in part with relatieon to the parties affected in the suit, and (7) is a question of fact in the particular case.

We come now to an application of the criteria for determining both relevant product market and relevant geographic market to the facts in this case. In advance of trial it was the position of the trial court, as set forth in its pretrial order, that the relevant product market was product oranges and the relevant geographic market Southern California and Arizona. At the close of plaintiff's case, the court was persuaded that the relevant product market included orange juices and concentrates and that the relevant geographic market was national rather than limited to Southern California and Arizona.[12]

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[12] In ruling on defendant's motion for dismissal or a directed verdict, following argument by counsel, the court said:

> "I was of the opinion that Florida was not a part of the market; that it was to be limited to Southern California and Arizona. I was of the opinion and still am of the opinion that it would certainly be uneconomical to try to ship fresh fruit from Florida or from Texas to California for the purpose of being converted into orange juice. So I have to look first to what is the competition in this case, what are the competitive factors?
>
> "Well, if we include Florida as part of the market, then of course Sunkist does not have a dominant place in this picture at all. It is a very minor part of the conversion of fresh fruit into orange juice, if we consider Florida as a part of the market.
>
> "Then I thought we were talking about product oranges, the monopoly of product oranges. But it seems to me that we now are talking about product oranges, but also about the juice squeezed from the product oranges. I don't know how you can say that there is a monopoly on product oranges without saying there is a monopoly on the juice that is squeezed from product oranges." (Rep. Tr. 1378:1-20).
>
> "So it seems to me that when we talk about competition, we are going to talk about competition not only of the fruit before it is squeezed, but the product after the squeezing, that is the orange juice.
>
> "Well, if you consider it in that light, then there is lots of competition on the shelves of Southern California, because the testimony is that the Florida producers, the Florida producers of orange juice, that is, those who squeeze the oranges to make orange

It is clear from the evidence that *orange products* (single strength juice and frozen concentrates) were sold in a national market. Oranges could be processed in Florida, and the juice shipped to California and sold competitively with juice processed in California from California oranges. Sunkist held a relatively small part of this national market and controlled neither quantity nor price.

On the other hand, it is equally clear that it was uneconomical for producers of orange products to buy their *product oranges* in Florida or elsewhere than in the Southern California-Arizona area. Sunkist controlled 70% of all oranges grown in this area and 67% of the product oranges. A substantial portion of the remaining product was unavailable to Case-Swayne.

Appellee does not question these facts, but contends that the relevant geographic market for product oranges was national on the theory that the product orange supply is tied irrevocably to orange product price. Appellee argues that product oranges "have value only because they can be converted into a product which has value", and that "the value of product oranges cannot exceed that which will permit them to be processed into products and then compete in a national products market dominated by Florida".

While product oranges may have little, if any, value per se, the same is true of many raw products. The market for raw products is among the processors rather than the ultimate consumer. We see no reason why the raw product may not be the relevant product market, even though it has little value in its raw state. Moreover, it is clear from the recent case of United States v. Pabst Brewing Company, supra, that even as to the processed product, the relevant market may at the same time be national, regional, and statewide in area.[13]

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juice in Florida, can ship it to Los Angeles, pay the shipping charges, and undersell the California product.

"So from these two standpoints, that is talking about competition, what is competition—competition is the competition in the open marketplace." (Rep. Tr. 1379:9-22).

[13] We concluded in Sunkist Growers, Inc. v. Winckler & Smith Citrus Prod. Co., 9 Cir. 1960, 284 F.2d 1, that the relevant market area for

While Sunkist could not control the supply or price of canned juices because of competition from Florida in these products, there was substantial evidence that it did control the supply of product oranges from which juice was made in California and Arizona. In determining the relevant geographic market, a proper test is the "geographic structure of supplier-customer relations." United States v. Philadelphia National Bank, et al., 1963, 374 U.S. 321, 357, 83 S.Ct. 1715, 10 L.Ed.2d 915. The relevant market is determined in part by the market area "to which the purchaser can practicably turn for supplies". Tampa Electric Co. v. National Coal Co., 1961, 365 U.S. 320, 327, 81 S.Ct. 623, 5 L.Ed.2d 580.[14] There is no question that Case-Swayne and other users of product oranges could not as a practical matter obtain product oranges from supplies outside California and Arizona.

Moreover, even though the price of product oranges in Florida would influence the price of product oranges in California, there was evidence from which the jury might find that Sunkist by reason of its control of the supply also as a practical matter controlled the price.[15] That is particularly true if it should be found that Sunkist refused to sell to plaintiff and other independent buyers at any price.

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oranges and by-products, including fruits and juices, was the California-Arizona area, although it does not appear that the parties in that case argued or the court considered the distinction between product oranges and orange products or any contention that the market was national.

[14] See also Standard Oil Co. v. United States, 1945, 337, U.S. 293, 299, note 5, 69 S.Ct. 1051, 93 L.Ed 1371.

[15] Morgan Ward, who handled the oranges of most of the independent growers, testified in pertinent part:

> "Q Is it your opinion, then, that the market conditions with respect to Florida product oranges have more effect on the price of product oranges in California than any one factor?
>
> "A They have effect on the over-all United States. Then those who set prices on the fruit in California look at what is going on all over the United States, and at that time the prices were set in California by the leading growers, Sunkist set it, using all those things to do it, I assume. But the price of by-products in this state has ever since I have been in the business since 1934, been set by Sunkist. At one time it was called California Fruit Growers Exchange, and Sunkist at this time." (Rep. Tr. 392:1-14).

As Mr. Justice Fortas said in his dissenting opinion [16] in the recent case of United States v. Grinnell Corporation, supra, "The central issue is where does a potential buyer look for potential suppliers of the service—what is the geographical area in which the buyer has, or, in the absence of monopoly, would have, a real choice as to price and alternative facilities? This depends upon the facts of the market place, taking into account such economic factors as the distance over which supplies and services may be feasibly furnished, consistently with cost and functional efficiency." (384 U.S. at 589).

We conclude that there was evidence from which the jury might properly find that the relevant product market was product oranges and the relevant geagraphic market Southern California-Arizona.

Evidence of Wrongful Use of Monopoly Power and Attempt to Monopolize

If the jury should find that Southern California and Arizona was the relevant market, there was sufficient evidence from which the jury could find further that Sunkist engaged in monopolistic practices or an attempt to monopolize proscribed by section 2 of the Sherman Act.

As the Court said in United States v. Grinnell Corp., supra:

> "The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."
>
> * * *
>
> "In United States v. du Pont & Co., 351 U.S. 377, 391, we defined monopoly power as 'the power to control

[16] Justices Fortas, Stewart and Harlan would have remanded for a "new determination" of the basic issue of "the definition of the relevant market".

> prices or exclude competition.' The existence of such power ordinarily may be inferred from the predominant share of the market. In American Tobacco Co. v. United States, 328 U.S. 781, 797, we said that 'over two-thirds of the entire domestic field of cigarettes and . . . ; over 80 per cent of the field of comparable cigarettes' constituted 'a substantial monopoly.' " (384 U.S. at 570-1).

It is clear that Sunkist had possession of monopoly power in the relevant market, if that market is found to be the Southern California-Arizona area.

It is true, as appellee contends, that size alone does not constitute an offense under the Sherman Act; nor does the mere possession of monopoly power. It is the wrongful use and exercise of that power which is proscribed by section 2 of the Act.

However, the ultimate consideration in determining whether an alleged monopolist violates section 2 of the Sherman Act is "whether the defendants control the price and competition in the market for such part of trade or commerce as they are charged with monopolizing". United States v. du Pont & Co., supra, 351 U.S. at 380. It is not always necessary to find a specific intent to find that an antitrust law has been violated. "It is sufficient that a restraint of trade or monopoly results as the consequence of a defendant's conduct or business arrangements (citing cases). To require a greater showing would cripple the Act. As stated in United States v. Aluminum Co. of America, 148 F.2d 416, 432, 'no monopolist monopolizes unconscious of what he is doing.' Specific intent in the sense in which the common law used the term is necessary only where the acts fall short of the results condemned by the Act." United States v. Griffith, 1948, 334 U.S. 100, 105, 68 S.Ct. 941, 92 L.Ed. 1236.

Appellant contends that Sunkist wrongfully exercised its monopoly power through (1) boycotting appellant by refusing to sell appellant product oranges while selling to other processors; (2) preventing TreeSweet from delivering oranges TreeSweet had committed to appellant; (3) con-

trolling orange prices; and (4) eliminating competitors (or as with appellant, limiting their profits) by maintaining high prices for oranges or reducing supply.

The same acts are relied upon in support of appellant's contention that Sunkist intentionally attempted to monopolize the trade in product oranges in the relevant market. Appellant relies upon additional evidence of such intent in Sunkist's (1) admitted purpose to control all the oranges it could get and utilize all of them in its own manufacturing facilities; (2) preventing Placentia Orange Distributors from fulfilling its promise to sell appellant 5,000 tons of oranges in 1957; (3) policing the Sunkist system to punish violators of the Sunkist "restrictive tying contracts"; (4) wrongful use of dual distribution by lowering single strength juice prices after competing manufacturers had purchased product oranges at prices established by Sunkist; (5) use of consignment contracts and its low 1956 bid (compared with its 1955 bid) to the Department of Agriculture.

Appellee recognizes in its brief that "the key determination by the trial court was that the appellant's evidence * * * established the fact that the relevant market for product oranges is a national market", but contends further that "under each of the tests which the courts have applied to determine whether or not a monopoly exists, the appellant's evidence conclusively established that there was no monopoly", and that with respect to each of the acts and incidents upon which appellant relies, Sunkist's conduct was "legitimate, cooperative activity and not undertaken in an unlawful manner or for an unlawful purpose". There is substantial evidence to support appellee's denial of each of the alleged acts of monopoly.

In determining the issues of monopolization and intent to monopolize, however, the evidence must be viewed as a whole. Even though the proof as to each of the specific acts may be insufficient in itself to establish wrongful use of monopoly power, the jury must look at the "whole picture", weigh the contradictory evidence and inferences and draw the "ultimate conclusion as to the facts". See Continental Ore Co. v. Union Carbide and Carbon Corp., supra, 370 U.S. at 699-701, and cases there cited.

As noted supra, in ruling on the directed verdict this court must give appellant "the advantage of every fair and reasonable intendment that the evidence can justify", and this is true "even though contrary inferences might reasonably be drawn". From a review of the record we conclude that there was sufficient evidence to submit to the jury the question of whether Sunkist wrongfully exercised its monopoly power and intentionally attempted to monopolize the trade in product oranges. We do not find that appellant has established any of the alleged acts of monopoly—only that viewing the evidence as a whole, it has made a prima facie case for the jury.[17]

Section 1 of the Capper-Volstead Act

Appellant contends that Sunkist is not a person "engaged in the production of agricultural products" under Section 1 of the Capper-Volstead Act because only 80.12% of its members are associations composed of fruit growers, while 4.97% are corporate growers, and 14.91% are private profit-makng corporations, individuals and partnerships which market through Sunkist the oranges they have purchased from growers.[18]

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[17] In Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., supra, the plaintiff relied upon some of the acts of monopoly here alleged. We upheld the submission of the case to the jury and the instructions given by the trial court. The Supreme Court granted certiorari limited to the issue of the immunity of interorganizational dealings among the three cooperatives from the conspiracy provisions of the antitrust law, and held that as a Capper-Volstead cooperative Sunkist was immune and that the case was erroneously submitted to the jury on the theory of a conspiracy under section 1 of the Act. Having held "erroneous one theory of liability upon which the general verdict may have rested • • • it is unnecessary • • • to explore the legality of the other theories." The Court said further that its decision "in no way detracts from earlier cases holding agricultural cooperatives liable for • • • monopolization", citing Maryland & Virginia Milk Producers Ass'n. v. United States, supra. Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., 370 U.S. at 20-30.

[18] A stipulation of the parties defining "association" in the Sunkist system recites that the members are classified into three major groups: (1) cooperative associations (80.12% by number and 82.34% by volume), (2) corporate growers (4.97% by number and 4.72% by

The district court concluded, and we think correctly, that under the decision of the Supreme Court in Sunkist Growers, Inc. v. Winckler & Smith Co., supra, Sunkist Growers, Inc., is a cooperative organized in compliance with Section 1 of the Capper-Volstead Act. It is true, as appellant argues, that this issue was not specifically raised in the Winckler case, but the Court did describe the Sunkist organization in detail. This was prior to the merger with Exchange Orange and Exchange Lemon, but the Court concluded that the 12,000 growers were "in practical effect and in the contemplation of the statutes one 'organization' or 'association' even though * * * formally organized * * * into three separate legal entities". (370 U.S. at 29). The Court also said in pertinent part:

> "The language of the Capper-Volstead Act is specific in permitting concerted efforts by farmers in the processing, preparing for market, and marketing of their products. And the legislative history of the Acts reveals several references to the Sunkist organization—then called the California Fruit Growers Exchange and numbering 11,000 members—including a suggestion by Senator Capper that this was a type of cooperative that would find 'definite legalization' under the legislation.
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> * * *
>
> "* * * That the packing is done by local associations, the advertising, sales, and traffic by divisions of the area association, and the processing by separate organizations does not in our opinion preclude these growers from being considered one organization or association

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volume), and (3) agency associations (14.91% by number and 12.94% by volume). The stipulation reads in part: "The Agency Association is normally a private corporation which owns and operates packing house facilities * * *. Such Agency Associations do not qualify as, nor do they claim to be, cooperative associations under section 1 of the Capper-Volstead Act. * * * The Agency Association does not itself participate in either the gain or loss involved in marketing fruit through Sunkist beyond the recovery of its costs and fixed fee for packing. Such Agency Association furnishes its facilities and services on an independent contract basis, wholly unrelated to the net returns from the sale of the product handled". (Clk. Tr. 1792-4).

for purposes of the Clayton and Capper-Volstead Acts." (370 U.S. at 28-29).

With respect to appellant's contention that Sunkist is not a qualified cooperative under Capper-Volstead by reason of its "corporate growers", this question was raised in the district court in United States v. Maryland & Virginia Milk Producers Ass'n, D. D.C. 1958, 167 F.Supp. 45, aff'd in part, reversed in part on other grounds, 362 U.S. 458, 80 S.Ct. 847, 4 L.Ed.2d 880. In that case the Government urged that the words "dairymen" and "farmers" should be restricted to natural persons. The district court held that it was immaterial "whether every member of the association is a natural person or a corporation." [19]

The Supreme Court did not comment on this portion of the district court's opinion, although it considered at length the scope of the immunity granted by Capper-Volstead. It is clear from the district court's opinion that the cooperative included corporate growers. It seems likely that this fact would have been considered by the Supreme Court if there were any question regarding the status of the association as a qualified cooperative by reason of the corporate growers.

1 U.S.C. 1 provides that in "determining the meaning of any act * * * of Congress, unless the context indicates otherwise * * * the words 'persons' and 'whoever' includes corporations * * * as well as individuals * * *".

We find nothing in the context of the Capper-Volstead Act to indicate that a corporation would not be considered a person within the meaning of the Act.

Does the fact that the so-called agency associations (comprising 14.91% by number and 12.94% by volume) constitute a "class" of membership prevent Sunkist from being a "person engaged in the production of agricultural prod-

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[19] The court said further:

"* * * The owner or operator of a dairy is a dairyman, whether he personally works on his dairy or has the work done by employees. So, too, the owner of a farm may be regarded as a farmer even though he devotes the major portion of his activities to other pursuits. * * *." (167 F.Supp. at 49).

ucts'' under section 1 of the Act? It will be noted from the stipulation of the parties (note 18) that the agency associations furnish their facilities and services on an independent contract basis, and that they do not participate in either gain or loss involved in marketing fruit through Sunkist. In other words, the growers receive full benefit of cooperative marketing through the agencies.

Associations organized under the Capper-Volstead Act ''may make the necessary contracts and agreements to effect'' the purposes of the Act, i.e., ''collectively processing, preparing for market, handling, and marketing'' their products. (7 U.S.C. 291). The agency associations supply services which the growers require (packing house facilities) in handling and marketing their products. The fact that the ''packing is done by local associations * * * and the processing by separate organizations'' does not preclude the growers from being considered one association for purposes of the Capper-Volstead Act. Sunkist Growers, Inc. v. Winckler & Smith Co. supra.

This is not a case where the agreement in question goes beyond the legitimate objects of processing and marketing. See e.g. United States v. Borden Co., 1939, 308 U.S. 188, 60 S.Ct. 182, 84 L.Ed. 181. The Court there recognized that agricultural producers ''may unite in preparing for market and in marketing their products'', and may ''make the contracts which are necessary for that collaboration'', but they are not authorized to conspire with others in restraint of trade. The Court said in part:

> ''In this instance, the conspiracy charged is not that of merely forming a collective association of producers to market their products but a conspiracy, or conspiracies, with major distributors and their allied groups, with labor officials, municipal officials, and others, in order to maintain artificial and non-competitive prices to be paid to all producers for all fluid milk produced in Illinois * * * and also to control 'the supply of fluid milk permitted to be brought to Chicago'.'' (308 U.S. at 205).

In Maryland & Virginia Milk Producers Association v. United States, supra, the court pointed out that the object of the conspiracy or combination was to eliminate a competitor and that the "allegations of the complaint * * charge *anticompetitive activities which are so far outside the 'legitimate objects' of a cooperative* that, if proved, they would constitute clear violations of § 2 of the Sherman Act * * *." (362 U.S. at 468). (Emphasis added). The Court said further:

> "The Embassy assets the Association acquired are useful in processing and marketing milk, and we may assume, as it is contended, that *their purchase simply for business use, without more, often would be permitted and would be lawful under the Capper-Volstead Act.* * * * The contract of purchase here, viewed in the context of all the evidence and findings, *was not one made merely to advance the Association's own permissible processing and marketing business;* it was entered into by both parties, according to the court's findings as we understand them, because of its usefulness as a weapon to restrain and suppress competitors and competition * * *." (362 U.S. at 471-72). (Emphasis added).

The independent contracts with the agency associations were for the legitimate objects of processing and marketing. Under the statute Sunkist could have entered into these contracts "with separate organizations". The mere fact that the agency associations constitute a "class" of membership does not in our opinion change the effect of the agency agreements or destroy the exempt status of the entire association.

Request for Leave to File Second Supplemental Complaint

Appellant next contends that the district court abused its discretion in denying plaintiff's motion to file a second supplemental complaint alleging facts occurring after the filing of the original complaint. In our opinion, upon remand of this case, appellant should be permitted to file the supplemental complaint. As the Court said in Texarkana

v. Arkansas Gas Co., 1939, 306 U.S. 188, 59 S.Ct. 448, 83 L.Ed. 598:

> "Where there is a good cause of action stated in the original bill, a supplemental bill setting up facts subsequently occurring which justifiies other or further relief is proper. If the original decree in the trial court had not been entered, this supplemental petition would simplify the controversy. We think this procedure is equally applicable after remand for further proceedings." (306 U.S. at 203).

Alleged Prejudice and Bias of Trial Judge

Finally appellant contends that the trial judge showed such marked prejudice against appellant that this court should order a new trial before another judge. In our opinion, the record does not support our issuance of the requested order. We are confident that the district court, upon remand and in the proper administration of its own functions, will insure that the retrial is conducted in the necessary atmosphere of total impartiality.

It Is Ordered that the judgment be reversed and the cause remanded to the district court for a new trial.

Ely, Circuit Judge (Dissenting in part):

I agree with the result reached by the majority, and I concur in its opinion except for that portion in which it is held that Sunkist falls within the exemption of section 1 of the Capper-Volstead Act, 7 U.S.C. § 291.

The principal reason offered by the majority in support of the view which I question is its asserted belief that the question was settled in *Sunkist v. Winckler & Smith Co.*, 370 U.S. 19, 8 L. Ed.2d 305, 82 Sup. Ct. 1130 (1062). I do not so interpret that decision. The particular issue was not presented to the Supreme Court, and it was not adjudicated. It was apparently conceded by the parties in *Winckler*, of which the appellant here was not one, that Sunkist was covered by the Capper-Volstead exemption. In the prior opinion of the Court of Appeals, reported at 284 F.2d 1 (9th

Cir. 1960), the only discussion of the exemption pertained to its extent, not to whether or not in was applicable. Furthermore, the Supreme Court, in granting certiorari, 368 U.S. 813 (1961), expressly limited its consideration to a single question, namely,

> "Where a group of citrus fruit *growers* form a cooperative organization for the purpose of collectively processing and marketing their fruit, and carry out those functions through the agency of three cooperative agricultural associations, each of which is basically *wholly owned and governed by those growers, and each of which is admittedly entitled to the exemption from the antitrust laws accorded to agricultural cooperatives by the Capper-Volstead Act* (7 U.S.C.A., sec., 291) — is an unlawful conspiracy, combination or agreement established under Sections 1 and 2 of the Sherman Act upon proof only that these *growers*, through the agency of these three cooperatives, *agreed among only themselves* with respect to the extent of the division of the function of processing between them or with respect to the price they would charge in the open market for the fruit and the by-products thereof processed and marketed by them?" (Emphasis supplied.)

Even if the issue had been determined by the Supreme Court in *Winckler*, the admitted nature of Sunkist's present organizational make-up is such that the exemption should no longer be held properly to apply. The privilege to act together in "exempt" associations is conferred only upon "persons engaged in the production of agricultural products...." 7 U.S.C. § 291. The plain import of the statutory language is that such an association must be composed *solely* of agricultural producers. Regardless of whether Sunkist was thus composed at the time of the *Winckler* decision in 1962, as the Supreme Court's order granting certiorari, *supra*, indicates, it is clear that the composition is no longer the same In our case, it is conceded that the so-called "agency association," which comprise almost 15% of the membership of the Sunkist organiaztion, are *not* growers or

producers.[1] The majority, in disregarding the significance of this factor, may have been influenced by the absence of decisions squarely holding that an association must be composed entirely of growers in order to qualify for the exemption. I point out that, while there are no decisions to that effect, there are none to the contrary. The opinions in a number of cases contain language which suggests the conclusion which I see to be plainly required by the statute's terms. Some of this language is as follows:

> "The persons to whom the Capper-Volstead Act applies are defined in § 1 as *producers of agricultural products.* . . . *They* are authorized to act together 'in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce' their products. . . .
>
> "The right of *these agricultural producers* thus to unite . . . cannot be deemed to authorize any combination or conspiracy *with other persons* in restraint of trade that these producers may see fit to devise." *United States v. Borden Co.*, 308 U.S. 188, 204-205, 84 L.Ed. 181, 60 Sup.Ct. 182 (1939) (Emphasis supplied.).
>
> "The chief defense set up by the Association was that, because of its being a cooperative composed *exclusively of dairy farmers,* § 6 of the Clayton Act and §§ 1 and 2 of the Capper-Volstead Act completely exempted and immunized it. . . . Accordingly the court dismissed the Sherman Act § 2 monopolization charge, where the Association was not alleged to have acted in combination with others, but upheld the right of the Government to go to trial on the Sherman Act § 3 and Clayton

[1] In its footnote 18, the majority refers to a portion of a stipulation wherein the parties agreed that the agency associations furnished to Sunkist their "facilities and services on an independent contract basis. . . ." The stipulation does *not* say that the associations were independent contractors. It recites that they were *"members"* of the Sunkist system. If the association were truly separate and independent, then that determination should be made, in the first instance, by the District Court. If they were not "members" of the Sunkist system, then, as I see it, the exemption of the Capper-Volstead Act is irrelevant to the issue of the propriety of Sunkist's dealings with them. *United States v. Borden Co., supra.*

Act § 7 charges *because they involved alleged activities with* the owners of Embassy and other *persons who were not agricultural producers.*'' *Milk Producers Assn. v. U.S.*, 362 U.S. 458, 461-462, 4 L.Ed.2d 880, 80 Sup.Ct 847 (1960) (Emphasis supplied.).

''Thus, the full effect of § 6 is that a *group of farmers* acting together . . . cannot be restrained. . . .

''The Capper-Volstead Act . . . extended § 6 of the Clayton Act exemption to capital stock agricultural cooperatives . . . the general philosophy of both was simply that *individual farmers* should be given . . . the same unified competitive advantage . . . available to businessmen. . . .'' *Id.*, 362 U.S. at 465-466 (Emphasis supplied.).

''[O]ur decision in no way detracts from earlier cases holding agricultural cooperatives liable for conspiracies with outside groups, *United States v Borden Co.*, 308 U.S. 188. . . .'' *Sunkist v. Winckler & Smith Co.*, 370 U.S 19, 30, 8 L.Ed.2d 305, 82 Sup.Ct. 1130 (1962).

''The Court concludes that a combination between two or more agricultural cooperatives to fix prices of their products is exempt from the antitrust laws *provided that no other person that is not such an organization or a member of such a group is a part of the combination.*'' *United States v. Maryland Cooperative Milk Pro.*, 145 F. Supp. 151 (D.D.C. 1956) (Emphasis supplied.).

''*Although* the Capper-Volstead Act . . . and the Clayton Act . . . give *some privileges to combinations* of agricultural *producers, a combination of producers and distributors* to eliminate competition and fix prices at successive stages in the marketing of an agricultural product *is not privileged.*'' *United States v. Maryland & Virginia Milk Pro. Ass'n*, 179 F.2d 426, 428 (D.C. Cir. 1949) (Emphasis supplied.).

''The exemptions are accorded and immunities are conferred on agricultural cooperatives and their activities. *When they* step outside of their field and *conspire with persons who are not producers of agricultural com-*

> *modities,* they are *beyond the scope of the exemptions.'' United States v. Maryland & Virginia Milk Pro. Ass'n,* 167 F.Supp. 45, 51-52 (D.D.C. 1958), *modified,* 362 U.S. 458, 4 L.Ed.2d 880, 80 Sup.Ct. 847 (1960) (Emphasis supplied.).

The persistent theme of the foregoing excerpts is that a cooperative, even though it otherwise qualifies for exemption under the Capper-Volstead Act, forfeits its exemption when it combines with non-producers. If that is so, then it is logically inconsistent to hold that a cooperative, while composed in part of non-producers, may yet qualify for the exemption.

APPENDIX B

Filed April 22, 1964, Clerk, U.S. District Court, Southern District of California

CHARLES E. BEARDSLEY
SETH M. HUFSTEDLER
458 South Spring Street, Suite 610
Los Angeles, California 90013
MAdison 6 0671

ALLEN F. MATHER
707 West Fifth Street
Los Angeles, California
MAdison 8 7211

DONALD D. STARK
Law Bldg., Sixth and Main Streets
Corona, California
REdwood 7 1900
Attorneys for Defendant.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

No. 333-58 HW

CASE-SWAYNE CO., INC., *Plaintiff,*

vs.

SUNKIST GROWERS, INC., *Defendant.*

PRETRAIL ORDER NO. ONE

On Monday, March 2, 1964, there came on regularly to be heard before the Honorable Harry C. Westover, United States District Judge, in Courtroom No. 5 in the United States Post Office and Courthouse, Los Angeles, California, a preliminary Pretrail Conference and the following motions and other matters:

1. Motion by plaintiff for order requiring production of documents pursuant to Rule 34 Federal Rules of Civil Procedure.
2. Defendant's Objection to Interrogatories.
3. Motion of defendant to set the Capper-Volstead issue for argument, to sever the Supplemental Complaint for trial, and to authorize a responsive pleading and

certain motions to the Supplemental Complaint, and to set the time therefor.

In connection with the foregoing items, the Court had before it various affidavits, memoranda of points and authorities, and statements of reasons.

In addition, the Court had before it the joint Stipulation of Relevant Facts and Material Issues of Law Relative to Issue Raised by Capper-Volstead Defense, together with the briefs filed by the parties on said issue. The parties stipulated in open court, through their respective counsel, that the facts relating to the Capper-Volstead defense for the period covered by the Supplemental Complaint were in all material respects the same as the facts stated in the above stipulation, with the exception of the fact that in 1958 Sunkist, Exchange Orange and Exchange Lemon were all merged into one organization, Sunkist Growers, Inc., and for that reason the ruling of the Court upon the Capper-Volstead defense should apply to the entire period covered in the original and supplemental complaints. The Court approved said stipulation.

The Court heard oral argument upon the issues relating to the Capper-Volstead defense.

After reviewing all of the above documents and hearing oral arguments in open court, and good cause therefor appearing, the Court now makes the following orders, to constitute Pretrail Order No. One in the within cause:

1. The Court determines and rules that at all periods of time covered by the original and supplemental complaints on file herein, Sunkist Growers, Inc., Exchange Orange and Exchange Lemon have complied with, and have constituted one duly qualified agricultural cooperative under Section 1 of the Capper-Volstead Act, 7 U.S.C.A. Section 291.

2. The Court determines and rules that during the period covered by the original and supplemental complaints, an illegal conspiracy in violation of the Sherman Act could not exist solely between Sunkist Growers, Inc., Exchange Orange and Exchange Lemon, nor between any two of them, or between Sunkist Growers, Inc., and any other part of

the Sunkist system (including District Exchanges, Associations and growers affiliated therewith).

3. All motions before the Court are denied without prejudice to their removal at a later date.

4. All objections to interrogatories and objections to the motion to produce documents are sustained without prejudice to resubmitting the interrogatories and motions at a later date.

5. By April 1, 1964, the plaintiff is to file with the Court and serve upon the defendant a statement of its theory of the liability in this case, in accordance with its declaration in open court that this action is based on claimed monopolization. The plaintiff may, if it so chooses, incorporate by appropriate reference documents or parts thereof which it has previously filed in this case. The Court contemplates that after said statement is filed, it will request the plaintiff to file a statement of the evidence which supports said theory of liability. Thereafter, if necessary, the defendant will be ordered to file a statement of its theory of nonliability.

6. Both parties are ordered to serve and file their opening statements to the jury by June 1, 1964, which statements shall not take more than thirty minutes to state to the jury. The Court will permit counsel to depart from the phraseology contained in said statements, but not from the general subject matter thereof.

7. The Court orders each party to file its proposed jury instructions, accompanied by citations of authority for each instruction, by June 1, 1964.

8. The Court orders that all documents necessary to bring this case to trial be filed with the Court by a date to be later fixed by the Court. Each party shall prepare and file an index of all documents submitted by it.

9. The Court directs the defendant to prepare the pretrial order in this case. After it has been submitted to counsel for the plaintiff, the plaintiff may file objections with the Court, and if the Court deems that a hearing is necessary, the hearing will be set and the Court will determine the pretrial order.

10. The Court sets the within cause for trial at 10:00 a.m. on Monday, November 9, 1964, in Courtroom No. 5 in the United States Post Office and Courthouse, in the City of Los Angeles, County of Los Angeles, State of California.

11. The Court orders that at the trial of this cause the issue of liability shall be tried first and separately from the issue of damages and thereafter, if the jury finds for the plaintiff on the issue of liability, the trial of the issue of damages shall take place. Said trial shall be before the same jury that tried the issue of liability, unless the parties stipulate that it may be before a different jury.

DATED: April 21st, 1964.

HARRY C. WESTOVER,
United States District Judge.

APPROVED AS TO FORM AND CONTENT:

W. GLENN HARMON
WILLIAM H. HENDERSON
By WILLIAM H. HENDERSON,
Attorneys for Plaintiff.

APPENDIX C

Filed Mar. 1, 1965. Clerk, U. S. District Court, Southern District of California. By ——, Deputy.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

No. 333-58—HW

CASE SWAYNE CO., INC., *Plaintiff*,

vs.

SUNKIST GROWERS, INC., *Defendant*.

MEMORANDUM AND ORDER GRANTING MOTION FOR DIRECTED VERDICT

Two motions are now pending for determination in the above-entitled action:

1. Motion for Directed Verdict, filed on behalf of defendant.
2. Motion for Mistrial, filed on behalf of plaintiff.

For the reasons hereinafter stated this Court is of the opinion the Motion for Mistrial should be denied and the Motion for Directed Verdict granted.

Defendant Sunkist Growers, Inc. (hereinafter designated as Sunkist) is a mutual association of citrus growers. It is a qualified Capper-Volstead cooperative. Approximately 12,000 citrus growers in Southern California and Arizona comprise the organization. Each member of the cooperative is a member of a Sunkist Packing House.

At the time of harvesting the citrus crop the packing house sends a crew into the grower's grove to pick the fruit and transport it to the packing house. There the fruit is washed, cleaned, and segregated. Most citrus fruit grown in the Southern California-Arizona area is forwarded to the fresh fruit market not only in Southern California and Ari-

zona but also in all other states of the Union and in foreign countries.

Years ago there was no market for fruit not required by the fresh fruit market, and as a consequence the remainder of the fruit (at that time termed "culls") was destroyed by the packing houses. But with the development of the citrus juice industry demand arose for fruit not consumed by the fresh fruit markets, with the result that culls (now designated as "excess fruit") could be sold to processors to convert into juice or other by-products.

Plaintiff is a corporation which for many years has been processing excess oranges, making from them single strength orange juice or other by-products. Single strength orange juice is the natural juice obtained from the fruit. It is neither diluted nor concentrated in any manner. It is sealed in cans by the processor and sold on the market without refrigeration.

In the beginning of its processing activity plaintiff had no difficulty in obtaining at a reasonable price sufficient fruit for its needs. But when it was demonstrated that conversion of excess fruit into juice and other citrus by-products was profitable. Sunkist decided to process its own fruit and for that purpose organized Exchange Orange Products Company and Exchange Lemon Products Company.

Exchange Orange Products Company was organized to process the excess oranges of the various Sunkist Packing Houses. Exchange Lemon Products Company was organized to process lemons and grapefruit grown by Sunkist members. As time went on and as Exchange Orange and Exchange Lemon developed processing capabilities, more and more excess fruit from Sunkist packing houses was channeled to Exchange Orange and Exchange Lemon until, at the present time, practically no excess Sunkist fruit is sold to independent processors.

Plaintiff attempted to obtained from other mutual citrus associations its requirement of fruit to process, only to find that such associations had entered into individual contracts with other processors; hence plaintiff was able to obtain very little fruit supply from mutual associations.

Because of plaintiff's inability to acquire excess fruit for

its processing plant, in April, 1958, it filed the above-entitled action against Sunkist, The Exchange Orange Products Company and The Exchange Lemon Products Company, on the theory that the three defendants had combined and entered into contracts, and had conspired, to restrain trade and commerce among the several states in by-product citrus products of the Southern California-Arizona area, and that the defendants had monopolized or attempted to monopolize by-product citrus fruits in the Southern California-Arizona area.

Winckler & Smith Citrus Products Co. had filed a similar action in the District Court for the Southern District of California, Southern Division (San Diego), naming the same defendants. The Winckler case was tried to a jury, and the jury found that a conspiracy did exist between Sunkist and Exchange Orange and Exchange Lemon; and the jury assessed a very substantial verdict against them.

On appeal to the United States Court of Appeals for the Ninth Circuit (281 F.2d 1, decided September 30, 1960) the verdict was affirmed on the issue of liability. Upon certiorari to the Supreme Court of the United States (*Sunkist* v. *Winckler & Smith Co.*, 370 U.S. 19), that Court reversed, stating at page 27:

> "We are squarely presented then, with the question of whether Sunkist, Exchange Orange, and Exchange Lemon—the three legal entities formed by these 12,000 growers—can be considered independent parties for the purposes of the conspiracy provisions of §§ 1 and 2 of the Sherman Act. We conclude not. Section 6 of the Clayton Act provides, inter alia, that agricultural organizations instituted for the purposes of mutual help shall not be held or construed to be illegal combinations or conspiracies in restraint of trade under the antitrust laws. * * *.
>
> "* * * *.
>
> "* * *, we feel that the 12,000 growers here involved are in practical effect and in the contemplation of the statutes one 'organization' or 'association' even though they have formally organized themselves into three separate legal entities.* * *."

Subsequent to the above-quoted decision of May 28, 1962, plaintiff in the action at bar filed herein an amended or supplemental complaint, in which the theory of consipiracy was abandoned; but monopoly and attempted monopoly were realleged. At the trial of the within action before a jury the following facts were established:

1. That Sunkist Growers, Inc. controlled approximately 70% of the citrus fruit grown within the Southern California-Arizona area.

That approximately 12,000 citrus fruit growers annually signed one-year contracts with Sunkist, agreeing to sell fruit through the Sunkist organization.

That each year the contracts were renewed by any grower who wished to renew; and each and every grower had the right to withdraw from the Sunkist organization if he so desired.

That the one-year contract provided that if, during the term of the contract, a grower did not abide by his contract and handle fruit through Sunkist, sanctions might be imposed upon the grower so breaching the contract.

That occasionally a grower failed to sell his fruit through Sunkist during his contract term but sold the fruit to others, and sanctions were imposed upon the breaching grower by the Sunkist organization.

2. That upon the establishment of Exchange Orange and Exchange Lemon, Sunkist commenced to process its excess fruit. Fruit not so processed was sold to independent processors, such as the plaintiff in this action.

That Sunkist had excess fruit available for sale to independent processors only when it was unable to process its own fruit.

That for several years Sunkist sold its excess fruit to independent processors by a bid system. That all independent processors, including plaintiff, were invited to present bids for fruit to be sold.

3. That the Sunkist trade mark or trade name was a valuable asset, and defendant had spent large sums in establishing its trade mark or trade name. That the

trade mark or trade name could be used by those growers selling fruit to Sunkist packing houses, but that if a Sunkist member grower withdrew from the organization or failed to abide by the contract terms, he was no longer permitted to use the trade name or trade mark "Sunkist."

4. That Sunkist employees observed operations of member growers to make certain that such growers handled their crops through only the Sunkist organization, and if and when discovery was made that a member grower sold fruit contrary to his contract with Sunkist, a report was made to Sunkist and, in certain instances, penalties were imposed upon the violating grower.

5. That the Department of Agriculture, pursuant to the school lunch program, requested bids for single strength orange juice; that one year Sunkist bid but did not receive the contract and, in another year, Sunkist bid and was awarded the contract.

6. That Sunkist made a large profit from sale of citrus fruit.

Although (to establish its claim of monopoly or attempted monopoly) plaintiff alleges that Sunkist practiced certain "predatory acts", not any of the acts complained of by plaintiff was in itself illegal.

It is plaintiff's contention that inasmuch as Sunkist controlled approximately 70% of all citrus groves in the Southern California-Arizona area, that in itself created monopoly. Size alone is not sufficient to establish monopoly; and any grower within the Southern California-Arizona area was free to join the Sunkist organization if he so desired.

There is no evidence before the Court to indicate that any grower was forced to join the Sunkist cooperative against his will. Joining Sunkist was an entirely voluntary act by the individual grower and, so far as the evidence disclosed, a grower joined the Sunkist organization solely because he felt he could obtain a better return from his crop than by selling it individually or by becoming a member of any other cooperative.

Plaintiff complains that Sunkist sold most of its crop to the fresh fruit market; consequently, more fruit channeled to the fresh fruit market meant less fruit available for processing.

The Sunkist organization belonged to the growers. It was the duty of Sunkist to sell the crops at the highest price it could obtain for its member growers.

Plaintiff complains that after Exchange Orange and Exchange Lemon were established Sunkist could not process all of its excess fruit through these two organizations and entered into contracts with third parties for the processing of excess fruit. This practice, plaintiff alleges, is an indication that defendant was attempting to obtain a monopoly.

But what Sunkist could do itself it could also accomplish through an agent, and there is nothing to indicate anything unusual or illegal in the arrangements Sunkist made with other processors to handle Sunkist's excess fruit.

Plaintiff complains of the so-called espionage system allegedly maintained by Sunkist, contending that by this "espionage" plaintiff was precluded from purchasing oranges from Sunkist growers.

If the contracts entered into each year by Sunkist with the individual growers were legal (and there is nothing in the record to indicate they were illegal), then Sunkist had the right to insist upon compliance with the contract terms; and so far as is apparent to this Court there is nothing illegal in a contracting party's insistence upon performance of a contract in accordance with its terms. And, if the contract provided for sanctions in the event of breach, there was nothing illegal in Sunkist's assertion of the sanctions upon a defaulting grower.

Plaintiff contends the bid-system sale of excess fruit by Sunkist indicated an attempt to establish a monopoly; that because of such bid system Sunkist was able to obtain higher prices for the fruit sold. No evidence was adduced at the trial to indicate the bid system was unlawful or had been unlawfully pursued. All processors were treated alike —bids were solicited from all processors; but plaintiff refused to bid.

Plaintiff has premised its amended or supplemental com-

plaint upon the theory of monopoly or attempted monopoly. The best definition we find of monopoly is "lack of competition." Plaintiff would limit the area of alleged monopoly or attempted monopoly (or lack of competition) to the Southern California-Arizona area; but to ascertain whether a monopoly or attempted monopoly did in fact exist, as contended by plaintiff, consideration must be given to the citrus market as a whole. Plaintiff would ignore national and foreign markets in its attempt to establish monopoly by Sunkist.

Evidence at the trial indicated the great majority of citrus grown in Southern California and Arizona goes into the fresh fruit markets. It was established that in Florida, however, the greater amount of oranges grown there went to the citrus products market. Evidence also disclosed that fresh fruit from California, Arizona, and Florida competed on the eastern and foreign markets.

Plaintiff charges defendants with monopoly of excess citrus fruit. If the area of competition could be limited to the Southern California-Arizona area only, there is no question that Sunkist dominated approximately 70% of the citrus produced in that geographic area. But evidence in the case established that the quantity of fruit produced in Florida had a direct bearing on prices of citrus produced in California and that, in fact, the major factor affecting prices of oranges in California was the orange harvest in Florida.

Although plaintiff would limit the market to Southern California-Arizona, evidence established there was one, national, citrus market, and that whatever happened in Florida directly affected prices in California and vice versa. Prices paid for oranges in California depended substantially upon the price for which oranges were sold in Florida.

The evidence indicated it was possible for processors in Florida to make single strength orange juice, can it, ship it to California, and sell it at the same price as (or at a price lower han) the Southern California-Arizona produced juice. The testimony was that Florida processors of single strength orange juice could assimilate transportation costs from Florida to California and sell their product in competition with single strength orange juice made within the

Southern California-Arizona area. This was possible because of the lower price for which Florida fruit could be purchased.

The Court must conclude there was competition in the orange juice industry between the Southern California-Arizona area and Florida. Evidence indicated the price paid for Florida oranges was the dominant factor in determining the price for which single strength orange juice could be sold to the ultimate consumer.

It further appears that there is also competition between single strength orange juice and orange juice concentrates. Neither of the parties in the action at bar were producers of concentrated or frozen juices. However, frozen juice is in direct competition with single strength orange juice.

The Court believes this case at bar to be similar to *United States v. du Pont & Co.*, 351 U.S. 377, in which the Supreme Court of the United States considered the question of competition of cellophane. The Government had filed an action against du Pont, alleging monopoly. The Court said, at page 399:

> "But, despite cellophane's advantages, it has to meet competition from other materials in every one of its uses. * * *. Thus, cellophane shares the packaging market with others."

And at page 404:

> "The 'market' which one must study to determine when a producer has monopoly power will vary with the part of commerce under consideration. The tests are constant. The market is composed of products that have reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered. While the application of the tests remains uncertain, it seems to us that du Pont should not be found to monopolize cellophane when that product has the competition and interchangeability with other wrappings that this record shows."

This Court is consequently of the opinion that processors of single strength orange juice in Southern California-Arizona had to meet competition of Florida single strength orange juice as well as the competition of juice concentrates.

At the conclusion of plaintiff's presentation of its case, defendant moved for dismissal under Rule 41 (b) of the Federal Rules of Civil Procedure or for a directed verdict under Rule 50 (a). But before entry of judgment counsel for defendant called to the Court's attention the amendment to Rule 41 (b), which amendment makes the rule applicable solely to cases tried without a jury; that the motion for dismissal under Rule 41 (b) was, therefore, in error, and defedant's motion for directed verdict under Rule 50 (a) was renewed.

As no judgment has yet been entered in this action, the Court is of the opinion the Motion for Directed Verdict now pending must be granted.

Rule 50 (a) of the Federal Rules of Civil Procedure provides:

> "* * *. The order of the court granting a motion for a directed verdict is effective without any assessment of the jury."

Judgment will be entered accordingly.
Dated this 1st day of March, 1965.

HARRY C. WESTOVER,
United States District Judge.

APPENDIX D

FCS BULLETIN 1
FARMER COOPERATIVES
in the United States
FARMER COOPERATIVE SERVICE • U.S. DEPARTMENT OF AGRICULTURE

Agricultural Cooperatives Have Legal Foundations

By Raymond J. Mischler*
Office of the General Counsel, U.S. Department of Agriculture

Cooperatives have had a considerable legal history. They now operate under well-defined Federal and State statutes, and their Federal income tax status has been defined by statute and regulations.

Federal Statutes Confer Rights

The Federal statutes do not contain a general definition of an agricultural cooperative association. In the Capper-Volstead Act, the Agricultural Marketing Act of 1929, as amended, and the Internal Revenue Code, however, agricultural cooperative associations are defined for the special purposes of such Acts. These definitions, although similar in some respects, are not identical. In addition, such associations are mentioned, but not defined, in several other Federal statutes.

The Capper-Volstead Act

The Capper-Volstead Act[5] was enacted to resolve any doubt regarding the right of producers of agricultural products to unite and act through a cooperative association to handle and market their products without violating the antitrust laws.

The original Sherman Anitrust Act[6] did not contain any reference to cooperative associations. When this Act was amended by the Clayton Act[7] in 1914, section 6 of the Act ostensibly assured labor and agricultural associations of the right to exist without violating the antitrust laws. But this section referred only to nonstock associations and was gen-

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* Now deceased.

[5] Approved February 22, 1922; 7 U.S.C. 291-292.

[6] 15 U.S.C. 1, *et seq.*

[7] 15 U.S.C. 12.

erally no considered a guarantee to farmers of the right to form marketing cooperatives.

Thus, the Capper-Volstead Act was passed to make it clear that the elimination of competition between individual agricultural producers, which occurs when they act together through a cooperative association, would not in and of itself constitute an antitrust violation.

The Capper-Volstead Act by its terms refers exclusively to the marketing functions of farmer cooperatives, and does not include purchasing or service functions. The United States Supreme Court has held that the Act confers no special immunity on a cooperative association which would not exist for any other business entity under like conditions.[8]

For an agricultural cooperative to come within the Capper-Volstead Act, it must be composed of "persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers;" must operate on a mutual basis for the benefit of its members as producers; and must conform to one or both of these requirements:

1. No member of the association may have more than one vote, or
2. The association may not pay dividends on stock or membership capital in excess of 8 percent per year; and must not deal in the products of nonmembers to an amount greater in value than such as are handled by it for members.

When the Secretary of Agriculture has reason to believe that an association within the scope of the Act monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced as a result, he may then start an administrative proceeding against the association. If, following a hearing, he finds that the facts are as suspected, he may issue an order directing the association to cease and desist from monpolization or restraint of trade. The Attorney General

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[8] *United States* v. *Maryland and Virginia Milk Producers Assoc., Inc.*, 362 U.S. 458 (1960); *United States* v. *Borden Co.*, 308 U.S. 188 (1933).

may institute court proceedings to enforce the Secretary's order.

The Agricultural Marketing Act

The Agricultural Marketing Act of 1929, as amended,[9] defines a "cooperative association" which is eligible to borrow from a bank cooperatives.[10] This definition follows the Capper-Volstead Act definition on the requirement that the association be composed of agricultural producers, the ration of nonmember business to member business, and the limitation of dividends on stock or voting rights or both.

However, the definition is much broader than the one in the Capper-Volstead Act in that it covers cooperative purchasing associations and those engaged in furnishing "farm business services."

It also provides that all business transacted by any cooperative association for or on behalf of the United States shall be disregarded in applying the nonmember-to-member business ratio.

The Internal Revenue Code [11] contains special provisions on the tax treatment of certain farmer associations which qualify thereunder and other cooperatives covered thereby. The requirements for qualification differ in some respects from those contained in the two definitions discussed previously. Since this subject is covevred in more detail in the next section of this publication, it will not be discussed further here.

The Cooperative Marketing Act

The Cooperative Marketing Act of 1926 [12] directed the establishment of a division in the Department of Agriculture to "render service to associations of producers of agricultural products, and federations and subsidiaries thereof,

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[9] 12 U.S.C. 1141j.

[10] The Agricultural Marketing Act definition is also used in determining the cooperative associations which are to be exempt from certain requirements of the Federal Motor Carrier Act of 1935, 49 U.S.C. 301, 303.

[11] 26 U.S.C. 501(c) (15) and (16), 521, 1381-1383 inc.

[12] 7 U.S.C. 451-457.

engaged in the cooperative marketing of agricultural products, including processing, warehousing, manufacturing, storage, the cooperative purchasing of farm supplies, credit, insurance, and other cooperative activities."

Under the Act of 1926, the U.S. Department of Agriculture, through the Farmer Cooperative Service, is authorized:

1. To acquire, analyze, and disseminate economic, statistical, and historical information regarding the progress, organization, and business methods of cooperative associations in the United States and foreign countries.

2. To conduct studies of the economic, legal, financial, social, and other phases of cooperation, and publish the results thereof. Such studies shall include the analyses of the organization, operation, financial, and merchandising problems of cooperative associations.

3. To make surveys and analyses, if deemed advisable, of the accounts and business practices of representative cooperative associations upon their request; to report to the association so surveyed the results thereof; and, with the consent of the association so surveyed, to publish summaries of the results of such surveys, together with similar facts, for the guidance of cooperative associations and for the purpose of assisting cooperative associations and developing methods of business and market analysis.

4. To confer and advise with committees or groups of producers, if deemed advisable, that may be desirous of forming a cooperative association and to make an economic survey and analysis of the facts surrounding the production and marketing of the agricultural product or products which the association, if formed, would handle or market.

5. To acquire from all available sources information concerning crop prospects, supply, demand, current receipts, exports, imports, and prices of the agricultural products handled or marketed by cooperative associations, and to employ qualified commodity marketing specialists to summarize and analyze this information and disseminate the same among cooperative associations and others.

6. To promote the knowledge of cooperative principles and practices and to cooperate, in promoting such knowl-

edge, with educational and marketing agencies, cooperative associations and others.

7. To make such special studies, in the United States and foreign countries, and to acquire and disseminate such information and findings as may be useful in the development and practice of cooperation.

Brief references to other important Federal statutes which specifically mention farmer cooperatives follow.

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Federal Income Tax Status Is Defined

The Internal Revenue Code of 1954, as amended by the Revenue Act of 1962, contains special provisions on the tax treatment of (1) certain farmers' associations which qualify thereunder and (2) all corporations operating on a cooperative basis to which the revised statute specifically applies.

Those farmer cooperatives qualifying under section 521 of the Code generally operate so as to have little or no taxable income. Associations which do not qualify (and about half of the existing associations do not) are liable for income tax on receipts devoted to the payment of a return on capital and on receipts which they do not pay to patrons as true patronage refunds in the manner prescribed by the Code.

The discussion will point out some of the more important phases of the statutes and regulations on this subject.

For Marketing and Farm Supply Cooperatives

The pertinent sections of the Internal Revenue Code of 1954 relating to marketing and supply associations are sections 521, 1381, 1382, and 1383 (the latter three sections comprising Subchapter T of the Code added by the Revenue Act of 1962):

If a cooperative can meet the requirements specified in section 521, it can qualify for the tax treatment provided in Part I of Subchapter T. The chief requirements for such qualification are these:

1. It must be a farmer, fruit grower, or like association organized and operated on a cooperative basis to (a) market the products of members or other producers, or (b) purchase supplies and equipment for the use of members or other persons.

2. Substantially all its stock (other than preferred nonvoting stock) must be owned by producers marketing products or purchasing supplies through it if it is organized on a capital share basis.

3. The dividend rate on capital shares must not exceed the legal rate of interest in the State of incorporation, or

8 percent a year, whichever is the greater, based upon the value of the consideration for which the capital share was issued.

4. Financial reserves are restricted to those required by State laws or those that are reasonable and necessary, and must be allocated to patrons unless the cooperative includes them in computing taxable income.

5. The business with nonmembers may not exceed 50 percent of the cooperative's total business, and the purchasing for persons who are neither members nor producers may not exceed 15 percent of the cooperative's total purchasing.

6. Nonmembers are to be treated the same as members in such business transactions as pricing, pooling, or payment of sales proceeds, in prices of supplies and equipment in fees charged for services, or in the allocation of patronage refunds to the accounts of patrons.

7. Permanent records of the patronage and equity interests of all members and nonmembers must be maintained.

8. The legal structure of the organization must be cooperative in character and contain no provisions inconsistent with these requirements, and the association must be actually operated in the manner and for the purposes outlined in the requirements.

In computing its net income, an organization qualifying under section 521 may, in addition to all other deductions authorized by law, deduct— . . .

1. Amounts paid by it during the taxable year as dividends on capital stock; and

2. Amounts paid to patrons, or allocated and disclosed to each patron in the manner authorized in Subchapter T, with respect to income during the taxable year which is derived from sources other than patronage (as, for example, rents received, investment income, gain on sale of depreciable property and capital assets, and income from business done with or for the United States Government).

Such an association also may exclude from gross income patronage refunds (called "patronage dividends" in the

Code) returned in the form and within the time prescribed in Subchapter T.

A cooperative which does not qualify under section 521, but which is covered by the definition is Subchapter T, files a regular corporate income tax return but is entitled to exclude from its gross income patronage refunds paid in the form and within the time prescribed in Subchapter T, under the same rules as are applicable to the so-called "exempt" cooperative.

In order for cooperatives to exclude patronage refunds they must be paid in cash or in "qualified written notices of allocation" on which the patron has (1) the option to redeem the allocation in cash during a 90-day period after issuance or (2) consented to treat the refund as his income. The patron may give this consent individually in writing, the cooperative may by its bylaws require members to give this consent, or the patrons may consent by endorsing and cashing a check representing at least 20 percent of the total patronage refund. In any event, an allocation is deductible only if at least 20 percent is paid in cash.

If cooperatives to which Subchapter T applies do not pay their patronage refunds in the form prescribed, they must include such "nonqualified allocations" in their income in the year issued. However, a deduction may be taken in the year in which a nonqualified allocation is redeemed in cash. If at that time the cooperative is not able to make use of a deduction, a refund may be obtained with respect to the taxes paid on this amount in the year the allocation was made.

Under the law, any patronage refund or other distribution by an exempt cooperative which the cooperative may exclude from its income must be included in the income of the patron when he receives notice of it, if the amount arises from business activity of the patron. Also, distributions in redemptions of "nonqualified allocations" can be included in the year received if they affect the patron's income from a business and do not arise out of personal living items. Thus, the principle of a single tax currently on taxable income generated through cooperative enterprise was established by this legislation.

Any dividends on capital from a so-called "exempt" cooperative are fully taxable to the shareholder (that is, not subject to the dividend credit which applies generally).

For Corporations Financing Crop Operations

Paragraph (16) of section 501 (c) of the Internal Revenue Code of 1954 provides for exemption from Federal income tax of certain corporations set up for the purpose of financing crop operations by organizations which qualify under section 521. It reads as follows:

(16) Corporations organized by an association subject to part III of this subchapter or members thereof, for the purpose of financing the ordinary crop operations of such members or other producers and operated in conjunction with such association. Exemption shall not be denied any such corporation because it has capital stock, if the dividend rate of such stock is fixed at not to exceed the legal rate of interest in the State of incorporation or 8 percent per annum, whichever is greater, on the value of the consideration for which the stock was issued, and if substantially all such stock (other than nonvoting preferred stock, the owners of which are not entitled or permitted to participate, directly or indirectly, in the profits of the corporation, on dissolution or otherwise, beyond the fixed dividends) is owned by such association, or members thereof; nor shall exemption be denied any such corporation because there is accumulated and maintained by it a reserve required by State law or a reasonable reserve for any necessary purpose.

For Mutual Insurance Companies or Associations

Farmer mutual insurance companies or associations meeting the provisions set forth in paragraph (15) of section 501(c) of the Internal Revenue Code may qualify for exemption. This paragraph (15) provides exemption for mutual insurance companies or associations other than life or marine (including interinsurers and reciprocal underwriters) if the gross amount received during the taxable year from interest, dividends, rents, and premiums (including deposits and assessments) does not exceed $150,000.

Steps Necessary To Qualify

If a farmer cooperative desires to qualify under section 521, the regulations require it to request a "letter of exemption."

It may obtain such a letter by filing an application on Form 1028 with the District Director of Internal Revenue Service for the district in which its principal place of business is located. To establish qualification under paragraphs (15) and (16) of section 501(c), quoted above, the organization must file the information required by the applicable sections of the regulations of the Internal Revenue Service.

Once the letter is granted it is not necessary to refile unless substantial changes occur in the organization or its activities. However, any such changes are required to be reported. This is done in connection with the annual returns, discussed below.

Exemption continues only so long as the legal setup and the operating methods are in accord with the requirements of the applicable statute and regulations. Hence a change in status can occur even though the letter of exemption is not withdrawn or cancelled.

Returns Required of Cooperatives

Annual returns by all cooperatives subject to Part I of Subchapter T are required to be filed by the 15th day of the 9th month following the close of the taxable (calendar or fiscal) year of the cooperative.

Cooperatives qualified under section 521 file on Form 990-C, and all others use the standard corporate Form 1120. Cooperatives *not* qualified under 521 can use the longer filing period only on a showing that they are obligated to—or have actually—paid at least 50 percent of their patrons' net margins as patronage refunds.

Information returns by organizations exempt under 501(c) must be filed annually by the 15th day of the 5th month following the close of the organization's annual accounting period.

All farmer cooperatives must report to the Internal Reve-

nue Service all payments of interest, dividends, and patronage dividends (as these terms are defined in the Code) of $10 or more a year to any one person and also send a statement of these payments to the recipient thereof indicating the amount in each category reported. The statements must show the name, address, and account number of the recipient. Heavy penalties are imposed for failure to make these reports.

The reports required are (1) in the case of dividends and interest, to be made with respect to amounts paid on or after January 1, 1963; and (2) in the case of patronage dividends [refunds], with respect to amounts paid on or after the first day of the first taxable year of the cooperative, beginning on or after January 1, 1963. The reports must be furnished to the Government on or before February 28 of the year following the calendar year for which the return is made; the statement must be sent to the payee on or before January 31 of that year.

Exemption From Stamp Tax

An association qualifying under section 521 is exempt from payment of a documentary stamp tax on the issue or transfer of shares or certificates of stock and certificates of indebtedness (See section 4382 (a)(3) of the Internal Revenue Code of 1954).

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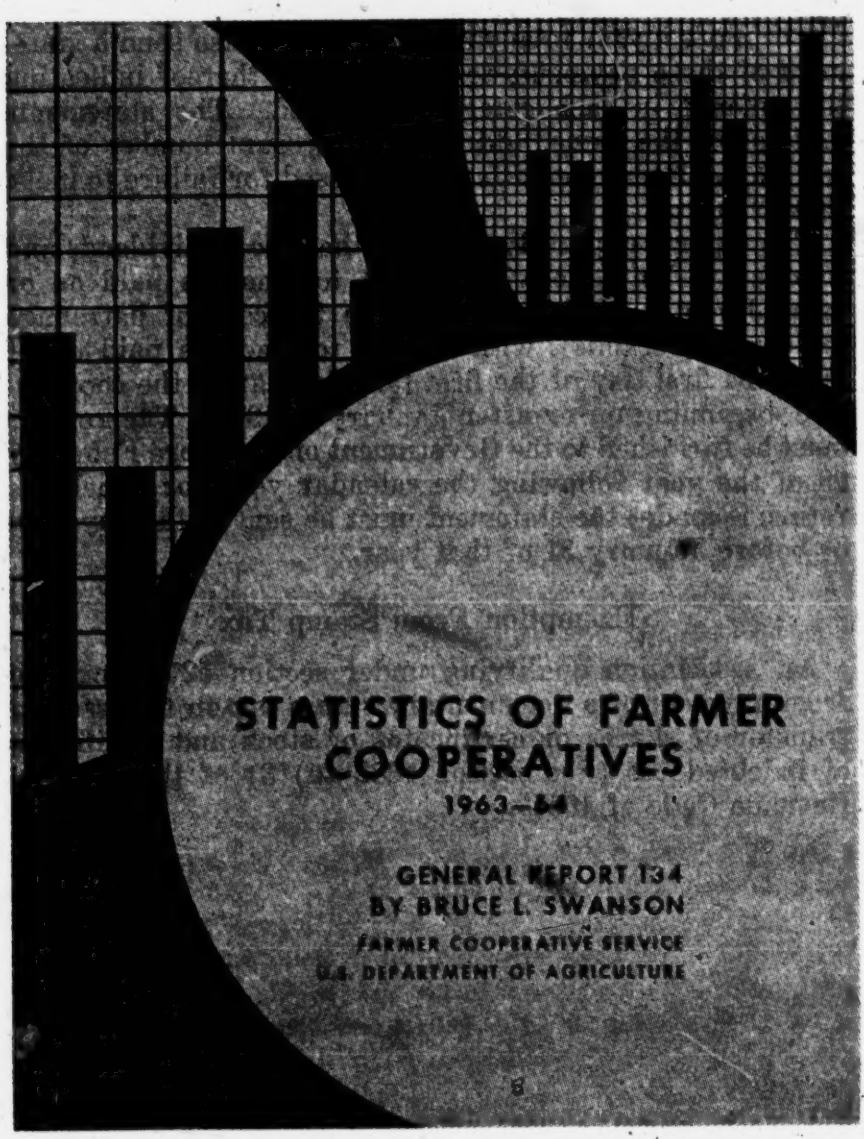
STATISTICS OF FARMER COOPERATIVES
1963–64
GENERAL REPORT 134
BY BRUCE L. SWANSON
FARMER COOPERATIVE SERVICE
U.S. DEPARTMENT OF AGRICULTURE

Table 1.—Estimated gross and net volume of business of marketing, farm-supply, and related-service [1] cooperatives, and percentage of total, 1950-51 to 1963-64

Period [2]	Gross volume (includes intercooperative business)				Net volume (excludes intercooperative business)			
	Farm products	Farm supplies	Related services	Total	Farm products	Farm supplies	Related services	Total
	$1,000				$1,000			
1950–51	7,984,777	2,437,521	99,958	10,522,256	6,361,766	1,685,413	99,958	8,147,137
1951–52	9,260,697	2,762,095	114,480	12,137,272	7,376,684	1,918,723	114,480	9,409,887
1952–53	9,294,945	2,866,908	141,750	12,303,603	7,365,795	2,013,768	141,750	9,521,313
1953–54	9,198,727	2,841,727	157,802	12,198,256	7,338,786	1,978,052	157,802	9,474,640
1954–55	9,347,913	2,921,859	195,522	12,465,294	7,424,743	2,021,617	195,522	9,641,882
1955–56	9,514,387	2,972,696	214,880	12,701,963	7,495,159	2,046,086	214,880	9,756,125
1956–57	10,110,115	3,152,985	234,629	13,497,729	7,998,887	2,145,939	234,629	10,379,455
1957–58	10,538,742	3,269,400	246,964	14,055,106	8,318,448	2,187,490	246,964	10,752,902
1958–59	11,412,483	3,549,922	272,866	15,235,271	9,103,089	2,371,061	272,866	11,747,016
1959–60	11,688,409	3,659,969	298,177	15,646,555	9,328,914	2,408,157	298,177	12,036,248
1960–61	12,143,722	3,744,711	305,600	16,194,033	9,631,247	2,472,286	305,600	12,409,133
1961–62	12,992,656	3,914,849	302,102	17,209,607	10,160,364	2,561,338	302,102	13,023,804
1962–63	13,893,463	4,145,263	303,281	18,342,007	10,834,165	2,704,400	303,281	13,841,846
1963–64 [3]	14,557,182	4,393,864	313,103	19,264,149	11,233,698	2,831,586	313,103	14,378,387

[1] Services related to marketing or supply purchasing but not included in the volumes reported for these activities.

[2] For years prior to 1950–51, see appendix table 7, FCS General Report 128. Data for prior years are not entirely comaparble due to revisions in statistical procedures in 1950–51.

[3] Preliminary.

Table 1.—Estimated gross and net volume of business of marketing, farm-supply, and related-service [1] cooperatives, and percentage of total, 1950-51 to 1963-64

Period [2]	Gross volume (includes intercooperative business)				Net volume (excludes intercooperative business)			
	Farm products	Farm supplies	Related services	Total	Farm products	Farm supplies	Related services	Total
	Percent				Percent			
1950–51	75.9	23.2	0.9	100.0	78.1	20.7	1.2	100.0
1951–52	76.3	22.8	0.9	100.0	78.4	20.4	1.2	100.0
1952–53	75.5	23.3	1.2	100.0	77.4	21.1	1.5	100.0
1953–54	75.4	20.3	1.3	100.0	77.4	20.9	1.7	100.0
1954–55	75.0	23.4	1.6	100.0	77.0	21.0	2.0	100.0
1955–56	74.9	23.4	1.7	100.0	76.8	21.0	2.2	100.0
1956–57	74.9	23.4	1.7	100.0	77.0	20.7	2.3	100.0
1957–58	75.0	23.3	1.7	100.0	77.4	20.3	2.3	100.0
1958–59	74.9	23.3	1.8	100.0	77.5	20.2	2.3	100.0
1959–60	74.7	23.4	1.9	100.0	77.5	20.0	2.5	100.0
1960–61	75.0	23.1	1.9	100.0	77.6	19.9	2.5	100.0
1961–62	75.5	22.7	1.8	100.0	78.0	19.7	2.3	100.0
1962–63	75.7	22.6	1.7	100.0	78.3	19.5	2.2	100.0
1963–64 [3]	75.6	22.8	1.6	100.0	78.1	19.7	2.2	100.0

In 1963-64, the gross volume of all farm supplies handled by cooperatives amounted to $4.4 billion, a 6-percent increase over the $4.1 billion gross in 1962-63. The net farm-supply volume of $2.8 billion accounted for 19.7 percent of the total net volume in 1963-64. This $2.8 billion net volume was a 4.7-percent increase over the $2.7 billion reported in 1962-63. Increases in net volumes of feed, fertilizer, petroleum products, and seed largely accounted for this rise.

The volume of services handled by all types of cooperatives amounted to $313 million in 1963-64, a 3-percent increase over the 1962-63 volume of $303 million. Service receipts represented 2.2 percent of the total net volume in 1963-64.

Table 2 shows the dollar volume of major commodities handled in 1963-64 and the number of cooperatives handling each commodity.

The estimated volume of farm supplies purchased by patrons from marketing, farm-supply, and related-service cooperatives in 1963-64 is shown by States and geographic regions in table 5. The East North Central and West North Central Regions combined accounted for almost 54 percent of the supplies purchased in 1963-64.

Table 5 also classifies the volume of related-service receipts by States and geographic regions. The West North Central Region ranks first with service-receipt volume amounting to more than $102 million, which is 32.6 percent of the total volume of service receipts reported by cooperatives.

In net volume of combined marketing, supply, and service receipts, California continued in first place with $1.57 billion, or 11 percent of the total net volume. Minnesota stayed in second place with $935 million net volume, or 7 percent of the total; and Iowa remained in third place with $845 million net volume, or 6 percent of the total.

Cooperatives and Memberships

The 1963-64 survey included a total of 8,847 marketing, farm-supply, and related-service cooperatives compared with 8,907 in the 1962-63 survey. Memberships in these

cooperatives totaled 7,079,500 compared with 7,218,750 in the previous survey.

Number of Cooperatives

The 8,847 marketing, farm-supply, and related-service cooperatives in the 1963-64 survey represent a decrease of 60 associations, or 0.7 percent from the previous year. Reorganizations involving mergers, consolidations, and acquisitions account in part for the decrease in the total number of cooperatives. Reorganization is generally for the purpose of improving operations and expanding services to meet the changing needs of farmer patrons.

Table 6 shows that the total of 8,847 cooperatives included 5,421 that primarily marketed farm products (marketing cooperatives), 3,266 whose major operation was handling farm production supplies (farm-supply cooperatives), and 200 related-service cooperatives.

Table 6.—Number and percentage of marketing, farm-supply, and related-service cooperatives, 1950–51 to 1963–64

Period [1]	Marketing		Farm supply		Related service		Total	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent
1950–51	6,519	64.8	3,283	32.6	262	2.6	10,064	100.0
1951–52	6,594	64.8	3,324	32.6	261	2.6	10,179	100.0
1952–53	6,501	64.2	3,378	33.4	249	2.4	10,128	100.0
1953–54	6,457	64.1	3,374	33.5	241	2.4	10,072	100.0
1954–55	6,330	63.9	3,346	33.8	227	2.3	9,903	100.0
1955–56	6,284	63.5	3,375	34.1	235	2.4	9,894	100.0
1956–57	6,284	63.5	3,373	34.1	234	2.4	9,891	100.0
1957–58	6,119	62.8	3,383	34.8	233	2.4	9,735	100.0
1958–59	6,042	62.5	3,387	35.1	229	2.4	9,658	100.0
1959–60	5,828	62.3	3,297	35.3	220	2.4	9,345	100.0
1960–61	5,727	62.5	3,222	35.2	214	2.3	9,163	100.0
1961–62	5,626	62.2	3,206	35.5	207	2.3	9,039	100.0
1962–63	5,502	61.8	3,211	36.0	194	2.2	8,907	100.0
1963–64 [2]	5,421	61.3	3,226	36.5	200	2.2	8,847	100.0

[1] For years prior to 1956–51, see appendix table 5, FCS General Report 128.
[2] Preliminary.

Comparison of 1963-64 with 1962-63 shows marketing cooperatives decreased from 61.8 to 61.3 percent of the total number of cooperatives; farm-supply cooperatives increased from 36.0 to 36.5 percent; and related-service cooperatives remained at 2.2 percent.

In analyzing the percentages in table 6, please note that in each annual survey some cooperatives are reclassified because of changes in the commodity type representing the major portion of their dollar volume.

In table 7, cooperatives are classified according to the commodity that consistently represents the largest percentage of their dollar volume of business.[3]

Minnesota continued to lead in total number of cooperatives with 1,122; Wisconsin was second with 658; and Iowa third with 567. These figures represent decreases for each of the three States.

[3] This method is discussed in FCS General Report 128, appendix, p. 68.

Organizing

A Farmer Cooperative

Farmer Cooperative Service
U. S. Department of Agriculture

FCS Circular 18 November 1956

[Upon dissolution or distribution of the assets of the association, the holders of all preferred stock shall be entitled to receive the par value of their stock, plus any dividend declared thereon and unpaid before any distribution is made on the common stock.]

In testimony whereof, we have hereunto set our hands this ———— day of ————, 19 ——.

_____ _____
_____ _____
_____

State of ————[15]
County of ———— ss.

Before me, a notary public, within and for said county and state, on this ———— day of ————, 19 ——, personally appeared ————, known to me to be one of the identical persons who executed the within and foregoing instrument, and he acknowledged to me that he had executed the same as his free and voluntary act and deed for the uses and purposes therein set forth.

Witness my hand and official seal the day and year above set forth.

_____
Notary Public

In and for the County of ————, State of ————.
My Commission expires ————.

Bylaws [16]

Article I—Purposes and Powers

The purposes for which this association is formed and the powers which it may exercise are set forth in the articles of incorporation of the association.

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[15] The required number of incorporators should acknowledge, and the acknowledgment form should conform to the requirements of the State of incorporation.

[16] The bylaws should be carefully checked against the State statute and the articles of incorporation, and should be consistent with them.

Article II—Membership

SECTION 1. *Qualifications.* Any person, firm, partnership, corporation, or association, including both landlords and tenants in share tenancies, who is a bona fide producer of agricultural products in the territory on which the association is engaged in business, and who agrees to be a patron of the association and who pays such membership fees and meets such other conditions as may be prescribed by the board of directors, may become a member of the association. This association shall issue a certificate of membership to each member which shall be in such form as may be prescribed by the board of directors but shall not be transferable.

SECTION 2. *Suspension or termination.* If, following a hearing, the board of directors shall find that a member has ceased to be an eligible member or has not, for a period of two (2) years, marketed through the association the products covered by a marketing agreement or agreements with the association or has not otherwise patronized the association or has movedv out of the territory in which the association is operating, it may suspend his rights as a member or terminate his membership. Upon termination of membership in the association, all rights and interests of such member in the association shall cease and such member shall be entitled only to payment or credit for the equitable appraised value of his property rights and interests in the association, as conclusively determined by the board of directors.[17] In determining property rights and interests all amounts allocated to each member or evidenced by certificates of any kind shall be excluded, and any such amounts shall be accounted for to members in accordance with the terms and conditions applicable thereto. No action taken hereunder shall impair the obligations or liabilities of either party under any contract with the association, which may be terminated only as provided therein.

* * * * * * *

[17] The State statute may prescribe the rights of a person whose membership is terminated, in which case this provision should be made consistent.

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IN THE

Supreme Court of the United States

October Term, 1966
No. 1157

CASE-SWAYNE CO., INC.,

Petitioner,

vs.

SUNKIST GROWERS, INC.,

Respondent.

BRIEF OF SUNKIST GROWERS, INC. IN OPPOSITION TO THE PETITION FOR CERTIORARI FILED BY CASE-SWAYNE CO., INC.

Case-Swayne Co., Inc., seeks to obtain review of the decision of the Court of Appeals for the Ninth Circuit that Sunkist Growers, Inc., is a qualified cooperative within the meaning of §1 of the Capper-Volstead Act. This issue was presented on a stipulated set of facts and both the District Court and the Ninth Circuit concluded that Sunkist was so qualified. This Court has previously reached the same conclusion in the case of *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19 (1962), a case in which the factual record was less extensive, but in which the underlying principles for the construction of the Capper-Volstead Act were clearly enunciated.

I.

THE PETITION OF CASE-SWAYNE CO., INC. FOR CERTIORARI SHOULD BE DENIED.

A. The District Court and the Ninth Circuit Determined a Factual Issue Within Rules of Law Recently Laid Down by This Court.

The Petition for Certiorari should be denied because it simply raises an issue of fact: Does the Sunkist system meet the organizational tests for Capper-Volstead qualification laid down in a unanimous opinion of this Court less than five years ago in the *Winckler* case, *supra*.

The petitioner contends that certain "members" of the Sunkist System—agency packing houses—are not growers and that Sunkist therefore cannot qualify under the Capper-Volstead Act. This Court laid down rules in the *Winckler* case which show that that contention is unsound.

This Court there held that the "members" of the Sunkist System within the meaning of the Capper-Volstead Act were the 12,000 growers of citrus fruit who marketed their fruit through the Sunkist System, and who received the economic benefit from its operation, and that the entire System was in effect one "association", even though the growers had formally organized themselves into several distinct legal entities. This holding was based on the fact that the formal organizational distinctions between the different legal entities within the cooperative were not of practical, economic significance to the growers, the consumers or the public.

The Courts below have made the same factual determination in this case, and reached the same conclusion. We believe that this conclusion is inescapable. The stipulation of facts on which this issue was tried states clearly and unequivocally that the agency packing houses handle a grower's fruit on a cost plus fixed fee basis, and do not participate in either the gains or losses involved in the cooperative marketing of the fruit through the Sunkist System.

Furthermore, the activities of the Agency Associations are the clearest kind of legitimate cooperative activities: picking, washing, sorting, grading, packing and shipping fruit of the grower who markets through the Sunkist System.

The determination is therefore entirely consistent with the rules heretofore laid down by this Court and with the purpose and requirements of the Capper-Volstead Act.

B. The Structure of the Sunkist System.

The factual record in this case[1] is more extensive than it was in the *Winckler* case. The record here shows that the Sunkist System is made up of a number of elements:

1. *Growers.* Growers (individuals, partnerships, corporations, trusts and estates) produce oranges independently. Sunkist Growers, Inc. does not participate in growing oranges.

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[1]The parties have entered into a Stipulation of Relevant Facts and submitted to the trial court the issue as to whether Sunkist was qualified under the Capper-Volstead Act. Since that Stipulation was not attached to the Petition, we have attached it hereto as Appendix 1. The facts which are stated herein are based on that Stipulation, unless otherwise noted.

2. *Associations.* Oranges, once brought to maturity, must be picked and prepared for sale. These functions of picking[2], washing, sorting, grading, packing and shipping are performed by packing houses. Three different kinds of arrangements are made by growers with packing houses:

a. *Cooperative Associations.* About 80% of the oranges in the Sunkist System are processed by cooperative associations. These are farmer cooperatives which own their own packing houses.

b. *Corporate Growers.* About 5% of the oranges in the Sunkist System are handled by corporate growers. These are growers (not necessarily, but often corporations) who own their own packing houses.

c. *Agency Associations.* The remaining 15% of the oranges in the Sunkist System are handled by Agency Associations. An individual grower may employ an Agency Association to process his fruit and market it through the Sunkist System.[3] The economic results of such operations are the same as those of the Cooperative Association, except that the grower employs the Agency Association to pick and prepare the oranges for sale on a cost plus fixed fee basis. The benefits of cooperative marketing are thus returned to the grower from Sunkist, through the Agency Association.

[2]While some growers pick their own fruit, most picking is done by specialized crews from the packing houses.

[3]In those cases in which the stockholders of the Agency Association also grow fruit, their fruit is handled on a uniform basis with that of non-stockholders.

The Stipulation between the parties expressly sets forth this fact:

> **"The Agency Association does not itself participate in either the gain or loss involved in marketing fruit through Sunkist beyond the recovery of its costs and fixed fee for packing. Such Agency Association furnishes facilities and services on an independent contract basis, wholly unrelated to the net returns from the sale of the product handled."** (Appendix 1, Para. 4, page 4.)

The economic operation of the Sunkist System is further explained by the Stipulation:

> "From an accounting standpoint, all members of the Sunkist System beyond the grower (with the exception of the Agency Associations as hereafter noted) operate on a strict cost basis, remitting to the grower, through the channels of the System, all marketing proceeds in excess of reimbursement of actual costs, and deductions or assessments for maintenance of authorized reserves or grower capital. The Agency Associations return to their growers all of the proceeds of marketing over their actual cost plus the fixed fee per box." (Appendix 1, Para. 9, p 13.)

Thus, whether the grower has his fruit processed by a Cooperative Association, an Agency Association, or his own packing house, he receives all of the benefits and bears all of the risk of cooperative marketing through the Sunkist System.

3. *District Exchanges.* The associations are organized into District Exchanges, for organizational and

accounting purposes. The members of a District Exchange are the associations it represents.

4. *Sunkist Growers, Inc.* The corporation, Sunkist Growers, Inc., is a nonprofit corporation. It serves as the marketing agency for all growers affiliated with the Sunkist System. Prior to 1958, the members of this corporation were individuals appointed by and representing each District Exchange. Since 1958, the members of Sunkist Growers, Inc. have been the District Exchanges and the packing houses. [Pltf. Ex. 1A—Sunkist's Amended Articles of Incorporation and By-Laws.]

5. *Other Elements.* The Sunkist System has processing facilities and other functions more particularly described in the Stipulation between the parties. Until 1958, two related corporations were Exchange Orange Products Company and Exchange Lemon Products Company, which provided other processing and sales facilities for the Sunkist System. In 1958, they were merged into Sunkist Growers, Inc.

C. The Same Basic Elements of the Sunkist System Were Reviewed in the Winckler Case.

In the *Winckler* case this Court was clearly aware of the fact that the Sunkist System was a federated structure consisting of a number of distinct legal entities. The Court there noted as follows:

> "Sunkist Growers, Inc. has at its base, 12,000 growers of citrus fruits in California and Arizona. These growers are organized into local associations which operate packing houses. The associations in turn are grouped into district exchanges, and representatives from these exchanges make up the

governing board of Sunkist, a nonstock membership corporation. Sunkist serves the members as an organization for marketing their fresh fruit and fruit products [footnote omitted] through its field, advertising, sales, and traffic departments. All of its net revenues are distributed to the members.

. . . .

"In sum, the individual growers involved each belong to a local grower association. Fruit which is to be sold fresh is packed by the associations and marketed by Sunkist, a nonstock membership corporation comprised of district exchanges to which the associations belong. Most fruit which is to be processed into by-products is handled by Exchange Orange, a subsidiary of Sunkist, or by Exchange Lemon, a separate organization comprised of a number of Sunkist member associations. [Footnote omitted.] It is then marketed by the products department of Sunkist which is managed by directors of Exchange Orange and Exchange Lemon." (370 U.S. 19, 21-22.)

The Court thus had the entire Sunkist System before it, but it was not specifically asked to consider the differences in operation of the various kinds of packing houses.

D. The Opinion of the Court of Appeals.

The Court of Appeals clearly recognized that the details of organization complained of in this case[4] are dif-

[4]Plaintiff has shifted its target on several occasions. Its initial attack on the Sunkist System [see Clk. Tr. p. 901] was

(This footnote is continued on the next page)

ferent from those discussed in the *Winckler* case, and it carefully applied the legal rules laid down there to the facts here under scrutiny. The Court of Appeals observed: "It is true, as appellant argues, that this issue was not specifically raised in the *Winckler* case, but the Court did describe the Sunkist organization in detail." (369 F. 2d 449, 460.)

The Court of Appeals reached the factual conclusion that the organizational distinctions between the agency packing houses and the cooperative packing houses in the Sunkist System are unimportant to the cooperative marketing objectives of the Capper-Volstead Act, and that the Sunkist System is fully qualified under that Act.

The Circuit Court stated its conclusions carefully and clearly:

> "It will be noted from the Stipulation of the parties [footnote omitted] that the agency associations furnish their facilities and services on an

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based on its assertion that Sunkist Growers was composed of seventeen individual members (designates of District Exchanges). Plaintiff claimed that, since it was not shown that these seventeen individuals produced more than 50% of the oranges in the Sunkist System, Sunkist Growers, Inc., could not be a qualified Capper-Volstead cooperative.

When the *Winckler* case was decided, the plaintiff recognized that this Court had laid down a rule that the 12,000 growers "are in practical effect and in contemplation of the statutes one 'organization' or 'association' even though formally organized into three separate entities. [Sunkist, Exchange Orange, and Exchange Lemon]." 370 U.S. 19, 29. This rule clearly destroyed plaintiff's initial position.

Plaintiff then abandoned its original claim, but on appeal asserted two others: (1) the one asserted here, *i.e.*, that participation by agency associations somehow causes the loss of the Capper-Volstead qualification; and (2) that the presence of corporate growers causes loss of the exemption. This second point has now apparently been abandoned.

independent contract basis, and that they do not participate in either gain or loss involved in marketing fruit through Sunkist. In other words, the growers receive full benefit of cooperative marketing through the agencies. . . . The agency associations supply services which the growers require (packing house facilities) in handling and marketing their products. The fact that 'packing is done by local associations . . . and the processing by separate organizations' does not preclude the growers from being considered one association for purposes of the Capper-Volstead Act. Sunkist Growers, Inc. v. Winckler & Smith Co., supra."

(*Case-Sawyne Co. v. Sunkist Growers, Inc.*, 369 F. 2d 449, 461 (1966).)

II.

PLAINTIFF'S ARGUMENT LACKS SUPPORT IN THE STATUTE OR CASE LAW.

A. Summary of Plaintiff's Argument.

The plaintiff never spells out the syllogism of its argument. Defendant confesses some uncertainty in characterizing plaintiff's argument, but plaintiff is apparently asserting the following position:

(i) Every "member" of a Capper-Volstead cooperative must be a grower, or the exemption of the Capper-Volstead statute is lost.

(ii) Agency Associations are "members."

(iii) Agency Associations are not all growers.

(iv) Therefore, Sunkist must lose the Capper-Volstead exemption.

B. Fallacies in Plaintiff's Syllogism.

There are two basic fallacies in the plaintiff's syllogism. *First,* there is no authority in the statute or in case law for the proposition that every "member" of a Capper-Volstead cooperative must be a grower. To the contrary, there are positive indications in the statute that all members need not be growers, and this Court in the *Winckler* case has already declared that all of the participants in this integrated structure need not be growers (*e.g.,* Exchange Orange Products and Exchange Lemon Products).

Second, for the purposes of the Capper-Volstead Act, the "members" are not the formal members of the corporation, but the individuals who receive the economic benefit of the cooperative activity. This Court has already pointed out that, in practical effect, the members of Sunkist are the growers who benefit by its activity.

1. An Agency Association May Be a Member Without Affecting the Capper-Volstead Exemption.

a. *The Capper-Volstead Act.*

Section 1 of the Capper-Volstead Act (7 U.S.C. §291) provides in part as follows:

> "Persons engaged in the production of agricultural products as . . . fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary

contracts and agreements to effect such purposes: *Provided, however,* That such associations are operated for the mutual benefit of members thereof, as such producers. . . ."

The Capper-Volstead Act contains several indications that non-growers may properly be a part of the overall structure.

(i) *Scope of collective action.* The Act contemplates much more than the production of fruit: it authorizes collective action involving "processing, preparing for market, handling and marketing." Those functions of course are not production functions, but the kind of function performed by Agency Associations, among others. The cooperative must therefore be authorized to obtain or employ the necessary services and facilities to accomplish these authorized ends.

(ii) *"Necessary contracts and agreements to effect such purposes."* The statute contemplates that the growers may contract with others to obtain the necessary services and facilities to accomplish the authorized activities. The Court of Appeals commented on this authority:

> "The independent contracts with the agency associations were for the legitimate objects of processing and marketing. Under the statute Sunkist could have entered into these contracts 'with separate organizations.' The mere fact that the agency associations constitute a 'class' of membership does not in our opinion change the effect of the agency agreements or destroy the exempt status of the entire association." (369 F. 2d 449, 462.)

(iii) "*For the benefit of the members, as such producers.*" The clear implication of this language from the Act is that members may be involved in some capacity *other than as producers.* Irrespective of these organizational details, however, the cooperative must be operated for their benefit as producers.

Sunkist meets this test. The economic benefits of collective action (and the risks) all are received (or borne) by the grower.

b. *The Presence in the Sunkist System of Non-Grower Entities Other Than Agency Associations Has Not Affected Sunkist's Capper-Volstead Qualification.*

It is worthy of note that the plaintiff has not attacked the Capper-Volstead qualification of the Sunkist System because District Exchanges are members, although District Exchanges, of course, are not fruit growers but simply another agent and instrumentality of the growers for bringing the fruit to market.

Perhaps more in point, the plaintiff has not challenged Sunkist's Capper-Volstead qualification because the cooperative associations are "members." Yet those associations are not growers. And they serve precisely the same functions as the Agency Association: they pick, wash, sort, grade and pack the fruit, and then ship to fill orders obtained by Sunkist as the marketing agency. Both kinds of associations return all of the benefit of cooperative marketing to the growers.

The situation here is quite similar to the one considered in detail by this Court in the *Winckler* case. There, the Court was considering the participation of the Exchange Orange Products Company and the Ex-

change Lemon Products Company which were separate corporations participating in the overall processing and marketing of the fruit. If Sunkist Growers, Inc. had issued a membership certificate to Exchange Orange Products or Exchange Lemon Products, the operation and effect of the entire system would not be changed. The *Winckler* decision makes it clear that the method used to tie the instrumentalities of the cooperative together are not material. The Court there reached the conclusion that in reality there was a single integrated structure, and the participation in the overall program by these two separate corporations was appropriate and did not cause the loss of the Capper-Volstead exemption. It is just as appropriate that the Agency Association participate to supply services needed by the members.

c. *There Is No Material Economic Significance in the Use of Agency Associations.*

The end result of the use of Agency Associations is the same as the use of Cooperative Associations. In both cases, someone must do the physical work. The Cooperative Association must have a manager and necessary employees. The Agency Association serves the same function. The only difference is that the Agency Association gives the growers an alternative to raising the immediate capital investment necessary to build the packing house. The economic effect on the grower, Sunkist, the consumer, and the public is ultimately the same.

2. For Purposes of the Capper-Volstead Act, Agency Associations Are Not "Members."

The second premise of the plaintiff, that agency associations are "members" of the Capper-Volstead or-

ganization, is not as sound as it might seem at first blush. It is true, of course, that under the bylaws of Sunkist Growers, Inc., all of the packing houses are "members" of the corporation. They are "members" in the sense that, under California statutes regulating nonprofit corporations, a nonprofit corporation has a board of directors and "members." However, membership within the formal corporate structure and membership for the purposes of the Capper-Volstead Act are quite different things.

In the *Winckler* case, this Court said that the formal corporate structure was not the key; that the real key was the "economic significance" of the entire organization:

> "With due respect to the contrary opinions of the Court of Appeals and the District Court, we feel that the *12,000 growers here involved are in practical effect and in the contemplation of the statutes one 'organization' or 'association' even though they have formally organized themselves into three separate legal entities.* To hold otherwise would be to impose grave legal consequences upon organizational distinctions that are of de minimis meaning and effect to those growers who have banded together for processing and marketing purposes within the purview of the Clayton and Capper-Volstead Acts. *There is no indication that the use of separate corporations had economic significance* in itself or that outsiders considered and dealt with the three entities as independent organizations. That the packing is done by local associations, the advertising, sales, and traffic by divisions of the area association, and the proces-

> sing by separate organizations *does not in our opinion preclude these growers from being considered one organization or association for purposes of the Clayton and Capper-Volstead Acts.*" (370 U.S. 19, 29.) [Emphasis added.]

The Court there was aware of the fact that the Sunkist System was organized as a pyramidal structure, whereby the growers were organized into packing houses, the packing houses were organized into District Exchanges, and the District Exchanges were organized into Sunkist Growers, Inc. The Court held, nonetheless, that in the sense of the Capper-Volstead Act, the members were the growers. We believe this is true with respect to the Agency Associations also, although that question was not specifically raised in the *Winckler* case.

We would, therefore, conclude that the members of the Sunkist System, for the purpose of applying the tests of the Capper-Volstead Act, are the growers who receive the economic benefit of the collective marketing system. In that sense, Sunkist Growers, Inc., the District Exchanges, and all of the packing houses other than the Corporate Growers are not "members" of the Sunkist System.

3. United States v. Borden Co., 308 U.S. 188 (1939) Has No Application to Determination of Capper-Volstead Qualification.

The Petition refers to the *Borden* decision (p. 11) as do portions of the dissenting opinion quoted in the Petition (p. 13). The suggestion seems to be that if the Agency Associations are simply agents brought in for the purpose of handling oranges, the *Borden* de-

cision would indicate that this arrangement is a conspiracy with an outsider and therefore might subject the cooperative to liability.

The suggestion was obliquely made in the Petition, perhaps because of its many apparent weaknesses. The Court of Appeals expressly pointed out the basic reason: hiring agents to do the work of processing and shipping oranges is the clearest kind of "legitimate cooperative activity" as defined by this Court in *United States v. Borden Co.*, 308 U.S. 188, 204 (1939), and *United States v. Maryland and Virginia Milk Producers Assn.*, 362 U.S. 458, 466 (1960). The Court of Appeals said:

> "The agency associations supply services which the growers require (packing house facilities) in handling and marketing their products. The fact that the 'packing is done by local associations * * * and the processing by separate organizations' does not preclude the growers from being considered one association for purposes of the Capper-Volstead Act. Sunkist Growers, Inc. v. Winckler & Smith Co., supra.
>
> This is not a case where the agreement in question goes beyond the legitimate objects of processing and marketing. See, e.g. United States v. Borden Co., 1939, 308 U.S. 188, 60 S.Ct.182, 84 L.Ed. 181. The Court there recognized that agricultural producers 'may unite in preparing for market and in marketing their products', and may 'make the contracts which are necessary for that collaboration', but they are not authorized to conspire with others in restraint of trade." (369 F. 2d 449, 461.)

Furthermore, the *Borden* question does not go to the issue of whether the cooperative is qualified under the Capper-Volstead Act; it goes only to the question of whether a *qualified* cooperative may have engaged in illegal conduct. And that question is answered by finding that the services performed by Agency Associations—namely, the picking, washing, sorting, grading, packing and shipping of oranges—constitute legitimate cooperative activities.

III.

CONCLUSION.

Respondent respectfully submits that the Petition should be denied.

Respectfully submitted,

CHARLES E. BEARDSLEY,
SETH M. HUFSTEDLER,
Attorneys for Respondent
Sunkist Growers, Inc.

DONALD D. STARK,
DALE V. CUNNINGHAM,
Of Counsel.

APPENDIX I.

[Names of Counsel, Title of Court and heading Omitted.]

Stipulation of Relevant Facts and Material Issues of Law Relative to Issue Raised by Capper-Volstead Defense.

By its answer to the complaint, defendant has asserted that it—and former defendants Exchange Lemon Products Company and The Exchange Orange Products Company during their corporate existences—is, and they were, duly qualified under Section 1 of the Capper-Volstead Act and entitled to the protection thereof. Based upon said claimed factual qualification, defendant has asserted a claimed defense to the charges or certain of the charges alleged in the complaint. Because the said issue of qualification under Section 1 of the Capper-Volstead Act, whether sustained or defeated, will materially affect the trial presentation by both plaintiff and defendant, it is the desire of the parties to obtain a determination by the Court of said issue on appropriate motion and ruling prior to trial.

To that end, the parties hereto have entered into this stipulation of the facts deemed by each to support its legal theory. In order to frame the legal issue as the same has been defined by counsel it was necessary to adopt, solely for purposes of this stipulation, certain estimates, approximations and generalizations as to which detailed information was not readily available or easily calculated. Accordingly, the facts herein stipulated to shall be deemed admitted and agreed upon for purposes of the determination of said issue in this action, but shall not be deemed admissions or statements of

fact by the parties or either of them for any other purpose or purposes.

Pursuant to the foregoing qualifications and for the purpose stated, the parties hereto, by and through their respective counsel, hereby stipulate that the following may be taken as and deemed to be admitted and true:

STIPULATIONS OF FACT

1. *Definition of Terms.* As used in this stipulation, the following terms shall have the meaning indicated in this paragraph:

(a) "Sunkist"—Sunkist Growers, Inc.

(b) "Exchange Orange"—The Exchange Orange Products Company.

(c) "Exchange Lemon"—Exchange Lemon Products Company.

(d) "1955 Agreement"—refers to the 1955 Sunkist-District Exchange Association Agreement, a copy of which is attached hereto as Exhibit "A".

(e) "District Exchange"—refers to the intermediate cooperative marketing agencies which are signatories to the 1955 Agreement.

(f) "Association"—refers to citrus packing houses which are signatories to the 1955 Agreement, which in turn are classified into three major groups:

(1) Cooperative Associations

(2) Corporate Growers

(3) Agency Associations.

(g) "Sunkist System"—refers collectively to the Associations and the growers shipping citrus fruit through them, the District Exchanges, Sunkist, Exchange Orange and Exchange Lemon.

2. *Cooperative Association.* The Cooperative Associations constitute 80.12% by number, and 82.34% by volume of fruit handled of all Associations in the Sunkist System. Such Associations are composed of growers who have joined together to market their fruit cooperatively, and for that purpose have acquired packing house facilities. All of the members of such Associations are fruit growers. Each such grower markets through the Association only the fruit which he produces. None of such Associations deals in the products of non-members in an amount greater in value than such as are handled by it for its members. In the aggregate, the non-member business of such Associations does not exceed ten percent (10%) of the value of all products marketed for members. None of said Cooperative Associations has ever paid dividends on its stock or membership capital in excess of 8% per annum. Some members of such Cooperative Associations are private corporations, which grow fruit, and which do not qualify as, nor do they claim to be, cooperative associations under Section 1 of the Capper-Volstead Act.

3. *Corporate Growers.* Associations which are Corporate Growers constitute 4.97% by number, and 4.72% by volume of all Associations in the Sunkist System. Such Associations are corporations which themselves grow citrus and whose total volume is sufficient to justify the installation of packing house facilities. Such Corporate Growers do not qualify as, nor are they claimed to be, cooperative associations under Section 1 of the Capper-Volstead Act. Such corporations market for their own account only the fruit which they produce and do not deal in the products of others in an amount greater in value than the quantity of products handled

for themselves. All products handled for others by such Corporate Growers are handled on an agency basis comparable to that of the Agency Associations.

4. *Agency Associations.* Agency Associations constitute 14.91% by number, and 12.94% by volume, of all Associations in the Sunkist System. The Agency Association is normally a private corporation which owns and operates packing house facilities. Some "Agency Associations" are individually owned enterprises and partnerships. Its stockholders may or may not be growers who ship fruit through the packing house owned by the corporation. That is, some have been fruit growers, and some have not been fruit growers. Where such is the case, the fruit of such stockholders is handled on a uniform basis with fruit of non-stockholders. Such Agency Associations do not qualify as, nor do they claim to be, cooperative associations under Section 1 of the Capper-Volstead Act. The packing house facilities of the Agency Association are made available to producers on the basis of the fruit being packed for market at cost plus a fixed fee. The Agency Association does not itself participate in either the gain or loss involved in marketing fruit through Sunkist beyond the recovery of its costs and fixed fee for packing. Such Agency Association furnishes its facilities and services on an independent contract basis, wholly unrelated to the net returns from the sale of the product handled. A contract between such an Agency Association and its growers which may be deemed as typical of such Associations is attached hereto as Exhibit "B".

5. *District Exchanges.* The District Exchanges are all membership corporations whose membership consists of Associations from one or more of the three

categories, to wit: Cooperative Association, Corporate Growers, and Agency Associations. None of the District Exchanges has ever paid dividends on its stock or membership capital in excess of 8% per annum. The District Exchange is not directly involved in the processing or marketing of fruit diverted to products utilization.

6. *Sunkist.* Sunkist is a membership corporation whose members prior to October 31, 1958, were individuals appointed by and representing each of the District Exchanges, on the basis of one member for each District Exchange. Such individual members have normally been growers, but some have not been. The amount of fruit marketed by such individuals through their local Associations, and thus through the Sunkist System, does not exceed 10% of the total fruit marketed by Sunkist. A copy of the Articles of Incorporation and By-laws of Sunkist which were effective during the period covered by this stipulation is attached hereto as Exhibit "C". A copy of a typical membership certificate issued during said period is attached as Exhibit "D". Sunkist has never paid dividends on stock or membership capital in excess of 8% per annum.

7. *Exchange Orange.* Exchange Orange was organized as a capital stock corporation under the general laws of California. A copy of its Articles of Incorporation and its By-laws are attached as Exhibit "E". Exchange Orange was during the period covered by this stipulation a wholly owned subsidiary of Sunkist, engaged in the processing and marketing of products oranges and grapefruit and the products produced therefrom. Exchange Orange has never paid dividends on its stock or membership capital in excess of

8% per annum. Exchange Orange and Exchange Lemon were engaged in producing a full line of citrus products. A description of the orange and grapefruit products is set out in the exhibit attached to Sunkist's answer to Interrogatory No. 2. (Identified in the pleadings as S-2-A-1 to S-2-A-25, and by this reference incorporated herein.) These products include juice products, such as single strength and concentrated juices, and peel products, including citrus oil, pectin, pharmaceuticals, cow feed, etc. All products so produced by Exchange Orange and Exchange Lemon were primarily citrus products, i.e., no products were produced in which a citrus derivative was a mere incidental ingredient.

8. *Exchange Lemon.* Exchange Lemon is a membership corporation whose members are the Associations who handle lemons; it is engaged in processing and marketing products lemons and the products produced therefrom. Exchange Lemon has never paid dividends on its stock or membership capital in excess of 8% per annum. The member Associations of Exchange Lemon include Cooperative Associations, Corporate Growers, and Agency Associations, as said associations are defined and described hereinabove.

9. *Sunkist System—History and Functional Development.* For purposes of describing the organization and functional development of the Sunkist System, the following brief history is set forth:

The California citrus industry dates its first major commercial development to the completion of the Southern Pacific line to Southern California in 1876. By 1885, Santa Fe had added its trackage and the Eastern markets were open.

The earliest shipments of oranges to the East in the 1870's were made by growers on an individual basis. Later, groups of neighboring growers joined together cooperatively to pool their fruit for purposes of sale. These informal groups had by 1892 begun to form into cooperative corporations.

In order to effectively market fresh citrus fruit in the major Eastern markets, it was necessary to have facilities where the fruit could be sorted, graded, washed, packed and shipped by rail. The earliest packing houses were commercial ventures. In their formative stages, the cooperative associations arranged to have their fruit packed by such packers under contract. The first cooperatively owned packing house facilities were acquired in the early 1890's. The concept of cooperative ownership of packing house facilities by the growers shipping through such facilities spread rapidly throughout the California citrus industry in the 1890's.

Early sales of oranges by pioneer growers in the 1880's had been to fruit buyers on an "on tree" basis. The local buyers soon sought to have the grower share the risks of the return on his fruit. Those risks were enhanced by the lack of understanding by buyers of the flow of fruit to the Eastern market—with the resulting glut of some markets and shortage in others.

The sales in the East, meantime, were being made by commission merchants interested primarily in volume and their consequent commissions, not in returns to the growers. After the disastrous marketing season of 1884-85, growers in the infant industry joined to form The Orange Growers Protective Union of Southern California, which for several years in the late 1880's suc-

ceeded in placing representatives in the Eastern markets thereby achieving more intelligent distribution of the crop and avoidance of glut. Despite this early beginning at cooperative marketing, the Union succumbed to the persistent opposition of commission men and buyers who were able to make larger profits dealing with growers individually.

After the failure of this and other early attempts at organizing grower marketing, there occurred a series of meetings in 1893 at which the cooperative technique of pooling fruit at the packing house level was explained. Out of these discussions came a plan for creation of informal Boards of Exchange in each producing district. These Boards were to be composed of representatives of each local association within the district. Uniform grades and brands were to be developed by each Board of Exchange for its district. The managers of each association in the district were to meet daily at the office of the district to transact the business of selling their growers' fruit.

The district Boards of Exchange in turn selected representatives on the Executive Board of the Southern California Fruit Exchanges. The Executive Board then had the duty of regulating and prorating sales from the several districts.

The concept of cooperative marketing through grower owned associations was enthusiastically adopted in 1893 and 1894. The informal district Boards of Exchange were incorporated as cooperative corporations by their member associations and were thereafter known as "District Exchanges".

In 1895 the Executive Board was incorporated as Southern California Fruit Exchange. In recognition of

the development of cooperative marketing in Central California, as evidenced by formation in 1901 of the Tulare County Citrus Fruit Exchange, Southern California Fruit Exchange was dissolved in 1905 and its functions were succeeded to by the newly-formed California Fruit Growers Exchange, which changed its name in 1952 to Sunkist Growers, Inc.

At the outset, Sunkist was entirely a sales department. That remains its primary function. But as an adjunct to its selling function, Sunkist developed many departmental activities of common value to its growers.

During the first two decades of the century, most of the departmental organization of Sunkist had its beginning. An early committee on claims preceded the development of a claims department of Sunkist in 1904. By 1910 this had developed into a Traffic Department, handling traffic claims and related problems for all Associations and District Exchanges affiliated with the Sunkist System.

Work in the field was of great importance. This included encouraging the institution of radical changes in the methods of handling fruit to implement the results of the decay investigation conducted by the U.S. Department of Agriculture in 1904. Research of all types was soon undertaken by Sunkist.

A field organization department was set up to help improve methods of organizing and operating District Exchanges and Associations.

Commencing in 1907, Sunkist developed an advertising program to promote sale of its growers' fruit. The "SUNKIST" trademark was adopted in that same

year and has been used continuously since then by Sunkist on the highest quality citrus fruit. In the wake of advertising, came the patent and trademark division.

Among other vital departments to develop in Sunkist was the Research Department, covering all forms of research from methods of handling and preserving fresh fruit to development of citrus products.

By 1915 there existed a substantial surplus production of lemons over and above the quantity which could be sold in the form of fresh fruit. Rather than destroy this surplus fruit, some of the packing houses shipping lemons through the Sunkist System joined together to organize Exchange By-products Company—which later changed its name to Exchange Lemon Products Company. This corporation was a cooperative endeavor by those associations which formed it. In later years all packing houses shipping lemons through the Sunkist System joined Exchange Lemon.

In 1918 some of the packing houses shipping oranges through the Sunkist System formed a similar corporation (named Exchange Orange Products Company) for purposes of handling surplus oranges. After an early disastrous experience in the marmalade business during the runaway sugar prices in World War I, that corporation was dissolved. A new corporation of a similar purpose and ownership was formed in 1920 under the name The Exchange Orange Products Company. In 1931, all of its stock was acquired in the name of Sunkist to assure the availability of its processing facilities to all Associations shipping oranges through the Sunkist System, as well as those Associations which had theretofore owned stock.

Thus, by 1920 the corporate and functional pattern of the Sunkist System was established as it remained until October 31, 1958, when Exchange Lemon Products Company and The Exchange Orange Products Company were merged into Sunkist and thereby became the Lemon Products Division and the Orange Products Division, respectively.

With regard to the physical handling of fruit, the grower cares for the trees and brings the citrus fruit to the point where it is ready to be picked. The packing house association then normally sends its specialized crews into the groves to pick the fruit. When the fruit is brought to the packing house, it is washed and graded. The fruit graded as products fruit is then diverted to a separate, so-called, juice fruit bin. The remaining marketable fruit is then either packed or put up as loose fruit awaiting sale on the fresh fruit market. When a sale in fresh fruit channels has been arranged, the fruit is shipped to the customer on a delivery price basis, or placed aboard the train or truck in the case of F.O.B. sales, or shipped to the selected auction or public sale markets. A limited amount of fresh fruit is also sold in the producing area on a negotiated sale basis in which case it is picked up at the packing house by the Buyer's trucker.

When the decision was made for any reason to divert fruit to products utilization (as distinguished from sale in fresh fruit channels) the Exchange Lemon or Exchange Orange was notified* and their trucks picked up the fruit for transportation to the appropriate processing plant. In those instances where the Exchange

*With the exception of Arizona grapefruit and Yuma oranges, which are handled locally.

Orange or Exchange Lemon sold a portion of the fruit diverted to it to processors not affiliated with the Sunkist System, that fruit was normally picked up by the processor direct at the packing house on authorization from the Products Company involved.

Neither the District Exchanges nor Sunkist had facilities for physically handling the fruit.** The actual handling of the fruit throughout the marketing operation is by the packing house Association, in the facilities of the appropriate Products Company, or in the hands of public carriers and the operators of public auctions.

Each District Exchange is organized and operated to meet the peculiar local needs of its member packing house Associations. In the job of marketing the fruit of its member Associations, the District Exchange generally is in communication, through representatives furnished by Sunkist, with customers in the major markets throughout the United States. District Exchange personnel possess specialized sales knowledge applicable to the fruit produced in the area served by the particular District Exchange. They negotiate and confirm sales for their member packing houses and arrange for the physical shipment of fruit to market. The District Exchange is not directly involved in the processing or marketing of fruit diverted to products utilization.

**With the possible exception of the Tempe, Arizona, plant which may have been operated by the Arizona Citrus Exchange since November 1, 1957.

Apart from its specialized marketing function, the District Exchange is one of the conduits of communication and representation between the local packing house Association and Sunkist. From an accounting standpoint, the District Exchange acts as a conduit through which payment of proceeds from the sale of fresh fruit and products oranges and grapefruit is made to its affiliated local Associations and assessments on fresh fruit for operating funds and revolving fund capital are collected.

From an accounting standpoint, all members of the Sunkist System beyond the grower (with the exception of the Agency Associations as hereafter noted) operate on a strict cost basis, remitting to the grower, through the channels of the System, all marketing proceeds in excess of reimbursement of actual costs, and deductions or assessments for maintenance of authorized reserves or grower capital. The Agency Associations return to their growers all of the proceeds of marketing over their actual cost plus the fixed fee per box.

The District Exchanges, Sunkist, Exchange Orange and Exchange Lemon market or process and market no citrus fruit other than that coming into the Sunkist System through the Associations.

All products produced by Exchange Orange or Exchange Lemon were marketed by Sunkist in its name.

[Statement of Issues of Law Omitted.]

ON THE BASIS OF THE FOREGOING stipulation of facts and issues of law, the parties respectfully ask leave of the Court to file concurrent briefs of the controlling law and facts on or before May 24, 1961, and concurrent reply briefs on or before June 26, 1961; whereupon the parties pray that the Court set the matter for argument and determine the issues herein set forth prior to trial.

Dated: April 10, 1961.

By s/ William H. Henderson
William H. Henderson
Attorney for Plaintiff

February 1, 1961.

By Donald D. Stark
By s/ Donald D. Stark
Attorney for Defendant

It is so Ordered.

Dated: February ...., 1961.

.....
Judge

[Exhibits omitted.]

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1966

CASE-SWAYNE CO., INC., *Petitioner,*

v.

SUNKIST GROWERS, INC., *Respondent.*

PETITIONER'S REPLY TO BRIEF OF RESPONDENT IN OPPOSITION TO PETITION BY CASE-SWAYNE CO., INC., FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

WILLIAM H. HENDERSON,
8510 16th St., No. 718,
Silver Spring, Maryland 20910.

W. GLENN HARMON,
703 Market Street, Suite 1400,
San Francisco, California 94103.
Attorneys for Petitioner.

J. EDWARD JOHNSON,
703 Market Street, Suite 1400,
San Francisco, California 94103.

RICHARD A. PERKINS,
202 So. Hamilton Drive, No. 700
Beverly Hills, California 90211.
Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 1157

CASE-SWAYNE CO., INC., *Petitioner,*

v.

SUNKIST GROWERS, INC., *Respondent.*

PETITIONER'S REPLY TO BRIEF OF RESPONDENT IN OPPOSITION TO PETITION BY CASE-SWAYNE CO., INC., FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Pursuant to paragraph 4, rule 24, Rules of the Supreme Court of the United States, the petitioner replies to respondent's brief in opposition to petitioner's petition for writ of certiorari to the United States Court of Appeals For The Ninth Circuit.

I

Sunkist does not deny the tremendous importance of the question presented by the petition for writ of certiorari. Sunkist could hardly do so. In Sunkist's petition for writ of certiorari in the *Winckler* case [1] (which was granted)

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[1] *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 370 U.S. 19 (1962).

to have this Court determine the confines within which a cooperative may act collectively Sunkist stated:

> "There are literally thousands of agricultural cooperatives in this country, having an aggregate membership in excess of 7 million farmers engaged in growing and producing a very large part of the agricultural produce and livestock of the nation. [*U. S. Dept. of Agric. General Report,* No. 76 (June 1960), pp. 1-3, 5-9, 29-45.]" (P. 18, Sunkist's Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, October Term, 1961, No. 241, in the *Winckler* case.)

The question presented by the instant petition is even more important. Thousands of cooperatives who do billions of dollars of business, lawyers, organizers of cooperatives will rely on the Court of Appeals' *assertion* (Petition, p. 9) and Sunkist's *assertion* (Sunkist's Brief, p. 1) that the Supreme Court has ruled in the *Winckler* case that: Private profit making corporations that do not produce agricultural products may comprise membership of an association under section 1 of the Capper-Volstead Act.

The Court of Appeals and Sunkist's assertions are erroneous. The Supreme Court has not but should decide this important question of Federal law. In addition to our statement on page 9 of our petition, we mention that the Supreme Court's grant of certiorari in the *Winckler* case was premised on the consideration that Sunkist was "*admittedly* entitled to the exemption from the antitrust laws accorded to agricultural cooperatives by the Capper-Volstead Act." *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.,* 368 U.S. 813 (1961) (Our emphasis).

The question presented is extremely grave and important. Section 1 of the Capper-Volstead Act explicitly and spe-

cifically restrict persons who may act together in Capper-Volstead associations to producers of agricultural products.

The "least" that can be said respecting the Court of Appeals' decision (to borrow the language of Mr. Justice Harlan in his concurring opinion in *Federal Trade Commission* v. *Procter & Gamble Co.* (No. 342, April 11, 1967) in that the Court of Appeals' decision leaves "*lawyers, and businessmen at large as to what is expected of them in future cases of this kind.*" (Our emphasis)

II

Sunkist contends that the petition "simply raises an issue of fact." (Respondent's Brief, p. 2) This argument was not raised before the Court of Appeals. The argument defies the Capper-Volstead stipulation and it is erroneous! In the Capper-Volstead stipulation the parties stipulated to facts "deemed by each to support its *legal theory* . . . . In order to frame the *legal issue* . . . . (Our emphasis) and: "to obtain a determination by the Court of said issue." (Respondent's Brief, p. 1 of Appendix) The parties stipulated to the "*issues of law*" for the District Court to determine (Cl. Tr., p. 1802; stipulations as to the issues of law were omitted from Appendix 1 of Respondent's Brief). In order that the District Court's ruling on the Capper-Volstead issue would cover the entire period of the law action (to January 31, 1962), the parties stipulated in open court that the facts as stipulated to in the Capper-Volstead stipulation were in all material respects the same to said period except for the merger of Exchange Orange and Sunkist, October 31, 1958. (District Court Pretrial Order No. 1, p. 4; Petition, p. 46, Appendix B; Cl. Tr. 1078-1083, Vol. A 25A-26A). Thus *a purely legal*

question was and is presented[2] on the Capper-Volstead issue, namely: Is a cooperative duly organized under section 1 of the Capper-Volstead Act notwithstanding that approximately 15 percent of its members are not producers of agricultural products, not cooperatives, but profit making enterprises?

III

Respondent argues that petitioner argues that "*every* 'member' of a Capper-Volstead cooperative must be a grower." (Respondent's Brief, p. 10)

The number of Sunkist packinghouse members that are not fruit growers, not associations of fruit growers but profit making corporations is approximately 15 percent and they supply approximately 13 percent of Sunkist's fruit. (The "Agency Associations", para. 4, Capper-Volstead Stip., Cl. Tr. 1793; p. 4 Appendix, Respondents Brief).

Such amounts are not *de minimis*. If 15 percent of a cooperatives' members need not be producers of agricultural products, why not 50 percent—or 100 percent? Such a construction of section 1 of the Capper-Volstead Act would nullify the specific mandate of Congress that only "persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations . . . ."

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[2] *Schadle* v. *Miller*, 131 Ind. App. 298, 162 N.E.2d 702 (1959); *1165 Fifth Ave. Corp.* v. *Alger*, 288 N.Y. 67, 41 N.E.2d 461 (1942); *Landy* v. *First Nat'l Bank and Trust Co. of Tulsa* (Okla.) 368 Pac.2d 987 (1962); *Rist* v. *Westhomer Oil Co.* (Okla.) 385 Pac.2d 791 (1963); *In re, Scott's Will*, 293 N.Y.S. 126, 249 App. Div. 542, aff'd in re *Central Hanover Bank & Trust Co.*, 274 N.Y. 538, 10 N.E.2d 538 (1937); *White* v. *United States*, 48 F.2d 178 (10th Cir. 1931); *Perry* v. *Wiggins*, 57 F.2d 822 (8th Cir. 1932), *cert. denied.* 287 U.S. 609 (1932).

IV

Sunkist contends that because the "Agency Association" packinghouse members buy their fruit from growers on a fixed fee, plus cost basis (and thus do not assume the risk of price changes) they somehow escape the requirements of the Capper-Volstead that members of cooperatives must be producers of agricultural products. (Sunkist's Brief, pp. 8, 9). Such argument is idle. The profits of these corporate packinghouse members under such purchases are as assured as under cost plus government contracts. Such contracts hardly convert profit making enterprises into producers of agricultural products.

V

Sunkist argues that it is "worthy of note" that we have not attacked Sunkist's Capper-Volstead qualification on the ground that Sunkist's District Exchanges are Sunkist members and they are not fruit growers and "cooperative associations" are Sunkist members and they are not growers. (Respondent's Brief, p. 12)

The District Exchanges represent the citrus packinghouses associated with it and are "conduits of communication and representation between the local packinghouse Association and Sunkist" (See Capper-Volstead Stipulation at pp. 12, 13, Appendix 1, Respondent's Brief; see also the *Winckler* case, 370 U.S. at p. 21. The Cooperative Associations are composed of growers (see paragraph 2, Capper-Volstead Stipulation, p. 3, Appendix, Respondent's Brief). We deemed that associations of growers duly organized under section 1 of the Capper-Volstead Act could properly be members of cooperatives. See *Winckler* case, 370 U.S. at p. 29. The class of packinghouse members petitioner is concerned with are the so-called "*Agency Associa-*

tions'' who are not producers of agricultural products, not cooperatives but profit making enterprises. This class of membership was not of record in the *Winckler* case. In Sunkist's Brief on the writ of certiorari to the Supreme Court in the *Winckler* case it was represented that *all* Sunkist packinghouses were grower associations and this representation was accepted by the Court in the *Winckler* case (See Petition, pp. 13-15).

VI

Sunkist argues that because section 1 of the Capper-Volstead Act permits associations and members to make the necessary contracts and agreements to affect the purposes of the association, growers "may contract with *others* to obtain the necessary services and facilities to accomplish the authorized activities." (Respondent's Brief, p. 11. (Our emphasis) Assuming such is the case, such right does not convert these *"others"* into producers of agricultural products and qualify them for membership in cooperatives. Such provision does not negate the explicit language of section 1 of the Capper-Volstead Act that members of cooperatives must be fruit growers. And the so-called "Agency Association" members are admittedly *not* fruit growers.

VII

The dissenting judge of the Court of Appeals correctly construed the majority decision of the Court as inconsistent with the Supreme Court's decision in *United States* v. *Borden Co.,* 308 U.S. 188 (1939). The quotation by the dissenting judge from the Borden case (Petition, p. 42) demonstrates this:

> "The persons to whom the Capper-Volstead Act applies are defined in § 1 as *producers of agricultural products* . . . . *They* are authorized to act together 'in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce' their products . . . .
>
> "The right of *these agricultural producers* thus to unite . . . cannot be deemed to authorize any combination or conspiracy *with other persons* in restraint of trade that these producers may see fit to devise." *United States* v. *Borden Co.*, 308 U.S. 188, 204-205, 84 L. Ed. 181, 60 Sup. Ct. 182 (1939) (Emphasis supplied)."

It is stipulated in the instant case that the so-called Agency Association members of Sunkist "do not qualify as . . . cooperative associations under section 1 of the Capper-Volstead Act" (Capper-Volstead Stipulation, para. 4, p. 4, Appendix, Respondent's Brief). *Hence, they are admittedly not entitled to the exemption from the antitrust laws accorded to agricultural cooperatives.*

VIII

On page 14 of its brief, respondent admits that the Agency Association packinghouses are Sunkist members but argue that membership of a cooperative under California statutes and membership "for the purposes of the Capper-Volstead Act are quite different things." (Respondent's Brief, p. 14) Whatever may be membership requirements of non-profit corporations under California statutes, one thing is indisputable: The pertinent membership requirement under section 1 of the Capper-Volstead Act is: Members must be "engaged in the production of agricultural products." Respondent's brief is an able effort to render this requirement meaningless.

The petition for writ of certiorari should be granted.

Respectfully submitted,

WILLIAM H. HENDERSON,
W. GLENN HARMON,
by *William H. Henderson*

J. EDWARD JOHNSON,
RICHARD A. PERKINS.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 66

CASE-SWAYNE CO., INC., *Petitioner,*

v.

SUNKIST GROWERS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR CASE-SWAYNE CO., INC.

Opinions Below

The majority and dissenting opinions of the Court of Appeals (R. 162-189) are reported at 369 F. 2d 449. The District Court's Pre-Trial Order No. One, dated April 21, 1964, involving the issue here presented, (R. 27-30) is unreported.

Jurisdiction

The decision of the Court of Appeals was entered on November 21, 1966. On December 16, 1966, petitioner filed a timely petition for rehearing pursuant to Rule 23 of the Rules of the Court of Appeals for the Ninth Circuit. On

January 12, 1967, said petition was denied by the Court of Appeals. On March 17, 1967, petitioner filed its petition for writ of certiorari. The petition was granted May 15, 1967. The jurisdiction of this Court is conferred by 28 U.S.C. 1254(1).

Statute Involved

Section 1 of the Capper-Volstead Act (7 U.S.C. 291) in pertinent part provides:

> "Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes . . . ."

Question Presented

Whether the majority of the Court of Appeals erred in holding that an incorporated association is duly organized under section 1 of the Capper-Volstead Act notwithstanding that approximately 15% of the association's members are not producers of agricultural products and not associations organized under said section but are profit making corporations.

Statement

Jurisdiction of the District Court was based on sections 1 and 2 of the Sherman Act and section 4 of the Clayton Act (15 U.S.C. 1, 2 ,and 15). (Complaint, R. 1).

On April 15, 1958, petitioner filed its complaint against Sunkist Growers, Inc. (hereinafter referred to as Sunkist), the Exchange Orange Products Co. (hereinafter referred to

as Exchange Orange) and Exchange Lemon Products Co. (hereinafter referred to as Exchange Lemon), alleging in part that these parties had combined and entered into contracts and conspired to restrain and monopolize trade and have monopolized and attempted to monopolize the trade in product oranges grown in California and Arizona in violation of sections 1 and 2 of the Sherman Act, alleging damages in the sum of $800,000.00 and praying that the damages be trebled pursuant to section 4 of the Clayton Act (R. 1-12).

On July 21, 1958, Sunkist, Exchange Orange and Exchange Lemon answered the complaint and (as relevant to this writ) alleged the affirmative defense that they were agricultural associations meeting the requirements of section 6 of the Clayton Act.[1] (15 U.S.C. 17) and section 1 of the Capper-Volstead Act (R. 13).

On October 31, 1958, Exchange Orange and Exchange Lemon merged into Sunkist. Sunkist assumed all the obligations of the merged corporations and pursuant to motion of Sunkist, Exchange Orange and Exchange Lemon were dismissed from the action (Pl. Ex. 1A, R. 120-160, 119; 14-19).

In April 1961, the parties presented to the District Court a stipulation of facts relating to the defense of section 1 of the Capper-Volstead Act, hereinafter referred to as the Capper-Volstead stipulation. The stipulation was filed October 27, 1964 (R. 32-119).

In the stipulation the parties stipulated to facts "deemed by each to support its legal theory" . . . In order to frame

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[1] The Capper-Volstead Act made the provisions of section 6 of the Clayton Act applicable to "associations" such as Sunkist, Exchange Orange and Exchange Lemon having capital stock. The issues raised by section 6 of the Clayton Act have been deemed embraced within the issues raised by the Capper-Volstead defense. *United States* v. *Borden Co.*, 308 U.S. 188 (1939); *Maryland & Virginia Milk Producers Ass'n, Inc.* v. *United States*, 362 U.S. 458 (1960).

the "legal issue" and "to obtain a determination by the Court of said issue" and stipulated to the "issues of law" for the District Court to determine (R. 33, 43-44).

On June 29, 1962, petitioner filed a supplemental complaint pleading transactions occurring since the date of the original complaint and alleging additional damages from April 15, 1958 to January 31, 1962, in the sum of $1,412,000 (R. 20-25).

At a hearing, March 2, 1964, the parties stipulated that the facts as stipulated to in the Capper-Volstead stipulation were in all material respects the same except for the merger of Exchange Orange and Exchange Lemon into Sunkist (October 31, 1958) and applied to the entire period of the action (R. 25-26).

On April 21, 1964, the Court signed Pre-Trial Order No. One. The District Court ruled therein that Sunkist, Exchange Orange and Exchange Lemon had complied with section 1 of the Capper-Volstead Act, and consequently a conspiracy in violation of the Sherman Act could not exist solely between Sunkist, Exchange Orange and Exchange Lemon, and ordered two separate trials, the first to cover the issue of liability and, if the petitioner prevailed, the second to cover the issue of damages. (R. 27-30). On May 27, 1964, in pretrial order No. Two, the Court ordered the issues in the action confined to whether Sunkist had a monopoly on oranges grown in California and Arizona, whether it had illegally used such monopoly power or had attempted to monopolize such oranges and damages (R. 30-32).

Exchange Orange was a 100 percent owned subsidiary of Sunkist. Exchange Lemon's membership was composed the same as Sunkist's membership. (Paragraphs 7 and 8 Capper-Volstead Stipulation, R. 36-37). See also the Supreme Court's decision in *Sunkist Growers, Inc.* v. *Winckler*

& Smith Citrus Products Co., 370 U.S. 19 (1962) at p. 22, hereinafter referred to as the *Winckler* case.) Thus, Exchange Orange and Exchange Lemon would fall with Sunkist. Therefore, in further discussion of the membership requirements of an association under section 1 of the Capper-Volstead Act we refer only to the composition of Sunkist's membership.

As is apparent from the Capper-Volstead stipulation, Sunkist's members *from whom it obtains its oranges* are citrus packing houses (hereinafter referred to as "packing houses") whose functions we mention later. When the packing house is an association of orange growers duly organized pursuant to the provisions of the Act, we have no quarrel with its membership in a cooperative.[2] For we deem that under this Court's decision in the *Winckler* case that a cooperative's members may consist of either actual farmers (or actual fruit growers in this case) or associations of actual farmers (or actual fruit growers) duly organized under the Act. For convenience, therefore, we argue only the specific contention presented by the writ of certiorari—that members of cooperatives must be actual farmers—or as applied to this case—actual *growers* of fruit.

Trial was had. Sunkist, without offering evidence, moved for a directed verdict which motion was granted. On March 2, 1965, a final judgment was entered. (R. 161).

On November 21, 1966, the Court of Appeals reversed the judgment of the District Court and held that petitioner had made a prima facie case for the jury that Sunkist had wrongfully exercised monopoly power and had intentionally attempted to monopolize the trade in product oranges in the California-Arizona market. *But* (one judge dissenting), the

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[2] As used in this brief the word "cooperative" refers to an association duly organized under section 1 of the Capper-Volstead Act.

Court of Appeals held that the District Court had correctly ruled that Sunkist had complied with section 1 of the Capper-Volstead Act, the issue we are here concerned with. (R. 162-189).

The facts relevant to the Capper-Volstead issue are as follows:

Sunkist obtained its fruit from its packing house members. The fruit *growers* were not Sunkist members except for certain "*Corporate Growers*" who had sufficient volume to install packing house facilities and who supplied 4.72 percent of fruit handled by Sunkist (R. 34-35).

The packing houses we are here concerned with are those denominated "*Agency Associations*" in the Capper-Volstead stipulation (R. 35).

To prevent confusion it should be kept in mind that Sunkist in its 1955 Sunkist-District Exchange-Association Agreement with packing houses (Ex. A to Capper-Volstead Agreement, R. 49) and in its Amended Articles of Incorporation and By-laws after the October 31, 1958 merger (Pl. Ex. 1A, R. 131, 119) refers to its packing house members collectively as "associations" even though the so-called "*agency associations*" (the packing houses we are concerned with) are *not* fruit growers, *not* associations of growers, *not* cooperatives but profit-making enterprises.

When this action was filed (April 15, 1958), the packing houses derived their Sunkist membership from their association with District Exchanges (Paragraphs 5 and 6 Capper-Volstead Stip. R. 36; Article XII, Sunkist's Articles of Incorporation R. 95) opening paragraph and paragraph 2 Exh. A to Capper-Volstead stipulation (R. 48-49). (See also the *Winckler* case, 370 U.S. at p. 21).

After the merger of October 31, 1958, and to January 31, 1962, (the end period encompassed by this action) the pack-

ing houses were *specifically designated members* of Sunkist (Article 2.2, Sunkist's "Amended Articles of Incorporation and By-Laws", Pl. Ex. 1A, R. 131, 119).

And, as mentioned above, the parties stipulated that the composition of Sunkist's membership were in all material facts the same for the entire period covered by this law suit (April 15, 1958-January 31, 1962) with exception of the merger of Exchange Orange and Exchange Lemon into Sunkist, October 31, 1958 (R. 25-26).

The function of the packing houses in the Sunkist system was to enter into agreements with growers for the grower's fruit, pick the fruit (after the grower had brought it to the point where it was ready to pick), wash, grade, and market it through Sunkist (Capper-Volstead Stip. R. 41-42); para. 23 of Exh. A to the Stip. (R. 58); Article 2.3; "Sunkist's Amended Articles of Incorporation and By-Laws", PL. Ex. 1A, R. 131, 119).

The "make-up" of Sunkists's *"Agency Associations"* members was stipulated to in paragraph 4 of the Capper-Volstead Stip. (R. 35).

> "4. *Agency Associations.* Agency associations constitute 14.91% by number and 12.94% by volume of all associations in the Sunkist system. The agency association is normally a private corporation which owns and operates packing house facilities. Some "agency associations" are individually owned enterprises and partnerships . . . *Such agency associations do not qualify as, nor do they claim to be, cooperative associations under section 1 of the Capper-Volstead Act."* (our emphasis)

The *"Agency Associations"* are *not* fruit growers. They (as is stipulated) are *not* cooperatives. They *purchase* the oranges they market through Sunkist from growers for the consideration of *"cost plus a fixed fee"* per box of oranges.

Hence, the agency association does not participate in either gain or loss involved in marketing through Sunkist. (Capper-Volstead Stip., R. 35-36; Exh. B to said stipulation which is "a contract between such an agency association and its growers which may be deemed as typical of such associations" (R. 70-72; 36)).

ARGUMENT

Under Section 1 of the Capper-Volstead Act Members of a Cooperative Must Be Actual Farmers That Grow the Agricultural Products They Market Through Their Cooperative.

A. *The Language of the Act.* The Act provides that persons engaged in the production of agricultural products *"as farmers" "or fruit growers"* may act together in associations. And further, that persons engaged in producing agricultural products "as farmers" "or fruit growers" may act together in associations "in collectively processing, preparing for market, handling, and marketing . . . *such products of persons so engaged.*"

This language alone would appear sufficient to limit members of cooperatives to actual farmers who raise the crop they market through their association. Congress made doubly certain that this should be the construction of the Act. In order to preclude any construction that would permit handlers of agricultural products (such as packing houses) who are not farmers to qualify as members of a cooperative, Congress added the descriptive words: "as farmers, planters, ranchmen, dairymen, nut or fruit growers." (This is borne out by the legislative history of the Act discussed *infra.*)

The language of the Act is not ambiguous. It is clear and definite. We submit that under the language members

of cooperatives (as applied to fruit growers) must actually be "fruit *growers.*"

B. *The Legislative History.* The legislative history of the Act shows that the Act's provisions qualifying persons for membership in a cooperative (that they must be "engaged in the production of agricultural products") meant *actual farmers* or *growers* of crops. Such history shows that the descriptive words "*as farmers*" and (as applied to this case) "or *fruit growers*" were made part of the Act as a precaution so that business concerns such as flour mills (or as in this case citrus packing houses) who in a very broad sense, produce agricultural products were *not* intended to qualify for membership in cooperatives. The legislative history shows that the purpose of the Act was to keep the boys on the farm, retain a country dotted with individually owned and operated farms, permit the farmer (who knows no eight-hour day) to obtain a better price for his crop.

> "**Mr. Cummins.** The suggestion made a moment ago by the Senator from Minnesota prompts me to ask him this question, which has perplexed me somewhat.
>
> The first two lines of the bill, together with the first word of the third line, read as follows:
>
> That persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers—
>
> May act together, and so forth. Are the words 'as farmers, planters, ranchmen, dairymen, nut or fruit growers' used to exclude all others who may be engaged in the production of agricultural products, or are those words merely descriptive of the general subject?"
>
> "**Mr. Kellogg.** I think they are descriptive of the general subject. I think 'farmers' would have covered them all.
>
> "**Mr. Cummins.** I think the Senator does not exactly catch my point. Take the flouring mills of Minneapolis:

They are engaged, in a broad sense, in the production of an agricultural product. The packers are engaged, in a broad sense, in the production of an agricultural product. The Senator does not intend by this bill to confer upon them the privileges which the bill grants, I assume?

"**Mr. Kellogg.** Certainly not; and I do not think a proper construction of the bill grants them any such privileges. The bill covers farmers, people who produce farm products of all kinds, and out of precaution the descriptive words were added.

"**Mr. Townsend.** They must be persons who produce these things.

"**Mr. Kellogg.** Yes; that has always been the understanding." (62 Cong. Rec. 2052 (1922), Senators Cummins, Kellogg and Townsend)

* * * * * * *

"Now, the farmer is in very much the same position. He is a small holder of land. His means and his opportunities are not sufficient to allow him to take any steps whatever in placing his products with the ultimate consumer or, usually, with the middleman." (62 Cong. Rec. 2050 (1922), Senator Kellogg)

* * * * * * *

"The farmer is an individual unit. He must manage his own farm. He must have his own home." (61 Cong. Rec. 1040 (1921), Representative Towner)

* * * * * * *

"Mr. President, startling facts are disclosed by the new census figures. The drift from the farm to the city is everywhere evident. In Illinois every county except five shows a decrease in rural population, and the cities show an increase. This is typical of the Nation." (62 Cong. Rec. 2060 (1922), Senator Capper)

* * * * * * *

". . . More and more it has become evident that the growers must have an opportunity to merchandise their products in an orderly way, instead of being compelled to dump them on a glutted market at prices below cost of production.

"Mr. President, every statesman looks forward to a condition as ideal when the whole country will be dotted with small farms, each operated by its owner." (62 Cong. Rec. 2058 (1922), Senator Capper)

* * * * * * *

"Mr. President, of course, the farmer can not consolidate his land into great holdings or into corporate ownership, and he should not do so. The hope of this Nation, the hope of any nation, the hope of the independence and the prosperity of our people, our very civilization, depends upon the individual ownership and proprietorship of the soil." (62 Cong. Rec. 2051 (1922) Senator Kellogg)

* * * * * * *

"It aims to authorize cooperative associations among farmers for the purpose of marketing their products. . . . The object of this bill is to modify the laws under which business organizations are now formed, so that farmers may take advantage of the form of organization that is used by business concerns.

"**Mr. Sabath.** In what way does this bill differ from the Clayton Act? The Clayton Act in a sense permits the farmers to organize.

"**Mr. Volstead.** The Clayton Act does not permit them to have any stock or operate for any profit. This bill makes it possible for them to have a small amount of stock and to operate to some extent for profit, but the profit must not exceed 8 per cent on their capital." (61 Cong. Rec. 1033 (1921), Representatives Volstead and Sabath)

* * * * * * *

"The purpose of this bill is to enable the farmers to organize in associations maintaining selling agencies and doing anything else that is necessary to enable them to increase the prices of their products." (61 Cong. Rec. 1043 (1921), Representative Husted)

* * * * * * *

"The producers of agricultural products have their troubles in obtaining farm help. The boys have left the farm. The farmers' sons who went to the late war have returned to the cities, attracted by the 'Great White Way,' and have lost their interest in the farm. One-half of the inhabitants of this country are living in the cities, where the problem of housing has become acute and the further problems of how to obtain employment has become a menace in our land. . . . The farmer is not and never has been a profiteer. He knows no 8-hour day." (61 Cong. Rec. 1044 (1921), Representative Hersey)

* * * * * * *

"Farmers must be paid as much net profit as other vocations bid. The movement of population from the country to the city will not end until that profit is paid." (61 Cong. Rec. 1041 (1921), Representative Sumners)

* * * * * * *

"Individual growers can not begin to handle marketing problems on an intelligent basis, because these problems are essentially group problems. The individual farmer has no more chance of selling his production fairly and intelligently over a longer period of time than has the individual shoemaker in a great shoe factory of selling his particular share of manufactured product distinct and separate from the whole of the products of his fellow workmen." (62 Cong. Rec. 2059 (1922), Senator Capper)

* * * * * * *

"**Mr. Reavis.** Premised upon a statement. Coming from an agricultural district, I state it as a fact that the farmer has always been compelled to take for his product the price that the purchaser offered, or he does not sell it. This bill is for the purpose of permitting an organization that will place him on an equality with every other American business man and in some measure permit him to fix the price of his products." (61 Cong. Rec. 1035 (1921), Representative Reavis)

* * * * * * *

"**Mr. Reavis** (continuing). I want to suggest to him that the farmer is the only business man in America to-day who does not fix the price of the products that he sells.

"The farmer goes to the grain buyer in the town where he does his business and if he disposes of his product he disposes of it at the price that he is offered; he never fixes the price. This legislation is primarily inspired by the desire to put the farmer in a condition, through cooperation and organization, where in some measure he may overcome the difficulties that inhere in his business, that make cooperation and organization almost impossible, to relieve him in some measure from his natural handicaps and put him on an equal footing with all the other business men of America and permit him in some measure to fix the price of the thing that he raises." (21 Cong. Rec. 1038 (1921), Representative Reavis)

* * * * * * *

"Section 1 defines and limits the kind of associations to which the legislation applies. These limitations are aimed to exclude from the benefits of this legislation all but *actual farmers* and all associations not operated for the mutual help of their members as such producers." (House Report No. 24, 67th Congress, 1st Session) (Our emphasis)

The legislative history of the Act is crowded with similar references. However, we believe it would be "carrying coals to Newcastle" to quote more legislative history.

It is true, as this Court stated in the *Winckler* case that the legislative history of the Act reveals several references to the Sunkist organization—then called the California Fruit Growers Exchange. But in none of the references cited by the Court (370 U.S. at p. 28, footnote 9) or in any we have found does it appear that members of the organization were not growers or associations of growers. To the contrary, Senator Walsh, in mentioning the organization refers to what are the packing houses as "*local associations* organized substantially as the associations contemplated and provided for in the bill are to be organized" (62 Cong. Rec. 2277).

C. *Prior decisions by this Court.* We believe that the precise question presented on this writ of certiorari is one of original impression and that it has never been decided by this Court. Following, we discuss briefly decisions of this Court which deal with cooperatives and which we believe support the petitioner's position in this case.

1. *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 370 U.S. 19 (1962).

The majority of the Court of Appeals in its decision in the instant case stated:

> "The District Court concluded, and we think correctly, that under the decision of the Supreme Court in *Sunkist Growers, Inc.* v. *Winckler & Smith Co.*, supra, Sunkist Growers, Inc., is a cooperative organized in compliance with Section 1 of the Capper-Volstead Act. It is true, as appellant argues, that this issue was not specifically raised in the Winckler case, but the Court did describe the Sunkist organization in detail." (R. 180)

The Supreme Court in the *Winckler* case did *not* hold that Sunkist was a cooperative organized in compliance with Section 1 of the Capper-Volstead Act. Winckler conceded that Sunkist was such a cooperative.

As the dissenting member of the Court of Appeals stated:

> "The principal reason offered by the majority in support of the view which I question is its asserted belief that the question was settled in *Sunkist* v. *Winckler & Smith Co.*, 370 U.S. 19, 8 L Ed. 2d 305, 82 Sup. Ct. 1130 (1062). I do not so interpret that decision. The particular issue was not presented to the Supreme Court, and it was not adjudicated. It was apparently conceded by the parties in *Winckler*, of which the appellant here was not one, that Sunkist was covered by the Capper-Volstead exemption. In the prior opinion of the Court of Appeals, reported at 284 F.2d 1 (9th Cir. 1960), the only discussion of the exemption pertained to its extent, not to whether or not it was applicable. Furthermore, the Supreme Court in granting certiorari, 368 U.S. 813 (1961), expressly limited its consideration to a single question, namely,
>
> 'Where a group of citrus fruit *growers* form a cooperative organization for the purpose of collectively processing and marketing their fruit, and carry out those functions through the agency of three cooperative agricultural associations, each of which is basically *wholly owned and governed by those growers, and each of which is admittedly entitled to the exemption from the antitrust laws accorded to agricultural cooperatives by the Capper-Volstead Act* (7 U.S.C.A., sec. 291)—is an unlawful conspiracy, combination or agreement established under Sections 1 and 2 of the Sherman Act upon proof only that these growers, through the agency of these three cooperatives, *agreed among only themselves* with respect to the extent of the division of the function of processing between them or with respect to the price they would charge in the open market for the fruit and the by-products thereof

processed and marketed by them?' (Emphasis supplied.)" (R. 185-186)

The issue decided by this Court in the *Winckler* case involved Sunkist's contention that 'Sunkist, Exchange Orange, and Exchange Lemon being made up of the same growers of associations, cannot be charged with conspiracy among themselves." (370 U.S. at p. 20). This Court construed that the District Court's instructions "quite plainly left it open for the jury to base their verdict upon a finding of a conspiracy among petitioners [Sunkist and Exchange Orange] and Exchange Lemon" (370 U.S. at p. 25). It stated: "We are squarely presented, then, with the question of whether Sunkist, Exchange Orange and Exchange Lemon—the three legal entities formed by these 12,000 growers—can be considered independent parties for the purposes of §§ 1 and 2 of the Sherman Act." It held: "We conclude not." (370 U.S. 27).

We submit: That is *what* this Court held respecting Section 1 of the Capper-Volstead Act and that is *all* this Court held.

The majority of the Court of Appeals also stated:

> "Associations organized under the Capper-Volstead Act 'may make the necessary contracts and agreements to effect' the purposes of the Act, i.e., 'collectively processing, preparing for market, handling, and marketing' their products. (7 U.S.C. 291). The agency associations supply services which the growers require (packing house facilities) in handling and marketing their products. The fact that the '*packing is done by local associations* * * * and the processing by separate organizations' does not preclude the growers from being considered one association for purposes of the Capper-Volstead Act. *Sunkist Growers, Inc.* v. *Winckler & Smith Co.* supra." (Our emphasis.) (R. 182-183)

The quotation from the *Winckler* case related to the Supreme Court's ruling that cooperatives organized by the same grower associations may be deemed one cooperative. The quoted provision of section 1 that associations may make the necessary agreements to effect the purposes of the Act is not relevant to the question here presented. Even assuming that said provision authorizes agreements between cooperatives and profit making enterprises for packing house services—The question presented by the writ is whether an incorporated association is duly organized under Section 1 of the Act notwithstanding the stipulation of the parties that approximately 15% *of its members* are *not* growers and *not* cooperatives. As was stated by the dissenting Judge of the Court of Appeals (R. 186-187 footnote 1):

> "The stipulation [Capper-Volstead stipulation] does *not* say that the associations were independent contractors. It recites that they were '*members*' of the Sunkist system". (Emphasis dissenting Judge)

Further, the profits of the Sunkist members described as "*Agency Associations*" were, under their agreements with growers, as assured as under cost plus government contracts. Such agreements therefore, could hardly convert them into cooperatives—Particularly as *it is stipulated* that they are *not* cooperatives.

Even if the Supreme Court in the *Winckler* case *had* held that Sunkist was organized in compliance with Sec. 1 of the Capper-Volstead Act, it decision would be neither binding nor precedent here. As the dissenting Judge of the Court of Appeals stated:

> "Even if the issue had been determined by the Supreme Court in *Winckler*, the admitted nature of Sunkist's present organizational make-up is such that the exemption should no longer be held properly to

apply. The privilege to act together in 'exempt' associations is conferred only upon 'persons engaged in the production of agricultural products . . .' 7 U.S.C. § 291. The plain import of the statutory language is that such an association must be composed *solely* of agricultural producers. Regardless of whether Sunkist was thus composed at the time of the *Winckler* decision in 1962, as the Supreme Court's order granting certiorari, *supra*, indicates, it is clear that the composition is no longer the same. In our case, it is conceded that the so-called 'agency associations,' which comprise almost 15% of the membership of the Sunkist organization, are *not* growers or producers." (Judge's emphasis.) (R. 186)

Further: The composition of Sunkist's membership in the *Winckler* case as it appears from the briefs to this Court and from this Court's decision in that case was that *all* Sunkist's packing house members were associations composed of fruit growers. On pages 5 and 6 of Sunkist's brief to this court in the *Winckler* case (filed February 7, 1962) Sunkist stated:

"*Each of these corporate entities* [Sunkist, Exchange Orange and Exchange Lemon] *handles only the fruit of Sunkist grower-members.* . . . Each of them complies in all respects with the organizational and other conditions prescribed by the Capper-Volstead Act for immunity from the sanctions of the antitrust laws in respect of such collective processing, handling and marketing of agricultural products. Indeed, that they do so comply was conceded below by all concerned. . . . *At the base of the Sunkist system are the individual growers. It is their fruit, and only their fruit that is handled by Sunkist.* It is they who control and manage all components of the Sunkist cooperative organization. *The individual growers have organized into local associations.* . . ." (Our emphasis.)

The respondent Winckler did not challenge Sunkist's description of the Sunkist system. To the contrary, on page 7 of its brief to this court (filed March 7, 1962), Winckler stated:

> "With a few additions deemed essential to an adequate factual presentation, respondents accept petitioner's description of the organization and functions of the constituent elements of the so-called Sunkist system of cooperatives."

The Court appears to have accepted these representations that *All* of Sunkist's packing house members were composed of *grower associations.*

> "Sunkist Growers, Inc. has at its base 12,000 growers of citrus fruits in California and Arizona. *These growers are organized into local associations which operate packing houses.*" (Emphasis supplied) (370 U.S. at p. 21).
>
> • • • • • • • •
>
> "In sum; *the individual growers involved each belong to a local grower association.*" (Our emphasis.) (370 U.S. at p. 22).

Whatever may have been the situation in the *Winckler* case (where it was unchallenged that all the packing houses were grower associations) it is clear from the record in *this* case that approximately 15% of Sunkist's packing house *members* supplying approximately 13% of Sunkist's fruit were *not* fruit growers, *not* associations of fruit growers, *not* cooperatives but profit making corporations.

2. *Maryland & Virginia Milk Producers Ass'n* v. *United States*, 362 U.S. 458 (1960)

Statements of the Supreme Court in the *Milk Producers* case indicate its recognition that under the Act members of cooperatives must be *actual* "farmers" (or, as applied to this case actual "fruit growers"):

> ". . . We believe it is reasonably clear from the very language of the Capper-Volstead Act, as it was in § 6 of the Clayton Act, that the general philosophy of both was simply that individual farmers should be given, through agricultural cooperatives acting as entities, the same unified competitive advantage—and responsibility—available to businessmen acting through corporations as entities." . . .
>
> "This [referring to House Report No. 24, mentioned *supra*] indicates a purpose to make it possible for farmer-producers to organize together, set association policy, fix prices at which their cooperatives will sell their produce, and otherwise carry on like a business corporation without thereby violating the antitrust laws." (362 U.S. at p. 466)

3. *United States* v. *Borden, Co.*, 308 U.S. 188 (1939)

The *Borden* case contains statements of like import. As quoted by the dissenting judge of the Court of Appeals:

> "The persons to whom the Capper-Volstead Act applies are defined in § 1 as *producers of agricultural products*. . . . *They* are authorized to act together 'in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce' their products. . . .
>
> "The right of *these agricultural producers* thus to unite . . . cannot be deemed to authorize any combination or conspiracy *with other persons* in restraint of trade that these producers may see fit to devise." *United States* v. *Borden Co.*, 308 U.S. 188, 204-205, 84

L.Ed. 181, 60 Sup. Ct. 182 (1939) (Emphasis supplied.)." (R. 187)

It is stipulated that Sunkist's agency association members "do not qualify as . . . cooperative associations under Section I of the Capper-Volstead Act" (R. 35). *Hence, they are admittedly not entitled to exemption from the antitrust laws accorded to agricultural cooperatives.* In the *Borden* case the Court ruled that a cooperative violated section 1 of the Sherman Act when it conspired with non-cooperatives to fix milk prices. Thus it appears inconsistent to permit non-cooperatives to fix prices as members of a cooperative. This inconsistency was pointed out by the dissenting member of the Court of Appeals in referring to his quotations from the *Borden* case, the *Milk Producers* case and the *Winckler* case.

> "The persistent theme of the foregoing excerpts is that a cooperative, even though it otherwise qualifies for exemption under the Capper-Volstead Act, forfeits its exemption when it combines with non-producers. If that is so, then it is logically inconsistent to hold that a cooperative, while composed in part of non-producers, may yet qualify for the exemption." (R. 189)

Conclusion

The number of Sunkist packing house members that are *not* fruit growers, *not* associations of fruit growers, *not* cooperatives but profit making corporations is approximately 15 percent and they supply approximately 13 percent of Sunkist's fruit. (*The "Agency Associations"*, para. 4, Capper-Volstead Stip.) (R. 35)

Such amounts are not *de minimis*. If 15 percent of a cooperatives' members need not be producers of agricultural products, why not 50 percent—or 100 percent? Such

a construction of section 1 of the Capper-Volstead Act would nullify the specific mandate of Congress that only "persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations . . . ."

Such construction would set at naught the intention of Congress. (See particularly colloquy between Senators Cummins, Kellogg and Townsend quoted *supra*, p. 9-10 Contrary to such intention, the Act would not simply permit *farmers* to associate and fix prices. *Such construction would permit handlers and users of agricultural products (such as packing houses, flour mills, packers of fruits and vegetables) to associate under the Act and fix prices.*

The decision of the majority of the Court of Appeals that Sunkist, and Exchange Orange and Exchange Lemon before they merged into Sunkist, were organized in compliance with section 1 of the Capper-Volstead Act should be reversed. And this Court should order that under the stipulations of the parties in this cause, as a matter of law, the defendants below were not organized in compliance with section 1 of the Capper-Volstead Act and were entitled to none of the privileges conferred by that Act.

Respectfully submitted,

WILLIAM H. HENDERSON,
W. GLENN HARMON,
by *William H. Henderson*

J. EDWARD JOHNSON,
RICHARD A. PERKINS.

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IN THE

Supreme Court of the United States

October Term, 1967

No. 66

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Petitioner,

vs.

SUNKIST GROWERS, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF OF RESPONDENT SUNKIST GROWERS, INC.

CHARLES E. BEARDSLEY,
SETH M. HUFSTEDLER,
DONALD D. STARK,
458 South Spring Street,
Suite 940,
Los Angeles, Calif. 90013,
Attorneys for Respondent Sunkist Growers, Inc.

DALE V. CUNNINGHAM,
P.O. Box 2706,
Terminal Annex,
Los Angeles, California,
Of Counsel.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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BRIEF OF RESPONDENT SUNKIST GROWERS, INC.

STATUTES INVOLVED.

This case involves the construction of Section 1 of the Capper-Volstead Act (7 U.S.C. §291), which has been quoted only in part by the Petitioner. It provides in full as follows:

> "Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of

persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: *Provided, however,* That such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:

"First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or,

"Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.

"And in any case to the following:

"Third. That the association shall not deal in the products of nonmembers to an amount greater in value than such as are handled by it for members."

THE QUESTION PRESENTED.

Are the fruit growers who have joined together in the Sunkist System for the cooperative marketing of their fruit entitled to the protection of the Capper-Volstead Act, notwithstanding the fact that 14.91% by number, and 12.94% by volume of the packing houses within the Sunkist System, through which these farmers ship their fruit to market, are private businesses, some of which are engaged in the production of oranges and some of which are not so engaged, but none of which participates in either the gain or loss involved in cooperative marketing of the growers fruit?

Comment.

The Capper-Volstead Act, quoted above, provides that farmers may act together in associations in collectively processing, preparing for market, handling, and marketing their products. The Act contains a number of restrictions, and requires that such associations must be operated for the benefit of the "members thereof, as producers."

The Capper-Volstead Act does not provide, however, as contended by the Petitioner, that farmers may not act together in cooperatively processing and marketing their farm products, merely because some non-producers are members of the association. The question before this Court is whether such a restriction should be read into the Act by implication. That determination should depend upon the effect of such membership, not upon the mere existence of such membership.

The Petitioner asserts that there is a defect in the form of the Sunkist organization because agency associations are "members." Since October 31, 1958 (when Sunkist, Exchange Orange Products Co. and Exchange Lemon Products Co. were merged, and Sunkist adopted its Amended Articles of Incorporation and Bylaws) agency associations have been members of the Sunkist System. [R. 131.] Petitioner, however, makes no examination whatsoever into the nature or effect, economic or otherwise, of these agency association memberships.

Sunkist contends that the Act is concerned with who gets the benefits of collective marketing, not who is called a "member."

As we will show in the following paragraphs, the agency associations which the Petitioner attacks are engaged in an essential cooperative marketing function, the preparing of fruit for market, pursuant to contracts with growers. [R. 36.] As provided in the Stipulation of Facts, these packing houses do not benefit in any way from cooperative marketing by the Sunkist System, except for the fees which they receive for their packing services. [R. 36.] Aside from this, the entire gain or loss of cooperative marketing through Sunkist devolves upon the growers. [R. 36.]

STATEMENT OF THE CASE.

A. The Sunkist Organization Is a Federated Cooperative System Through Which the Citrus Growers of California and Arizona Process and Market Their Fruit.

The Sunkist System is designed to accomplish the purposes of the Capper-Volstead Act. The Sunkist System antedates the Act by many years. It was begun in the 1890s [R. 39], and developed gradually up to 1920 when its corporate and functional pattern was established. [R. 41; see paragraph 9 of the Stipulation of Facts for this historical and functional development, R. 37-43]. By 1922, when the Capper-Volstead Act was adopted, the Sunkist System was an established example of cooperative marketing which Congress looked on with approval. (Appendix, pp. 15-21.)

The Amended Bylaws of Sunkist Growers, Inc., set forth the following declaration of purpose:

> "The fundamental purpose of the Sunkist System is to market the growers' citrus fruit in the form received, or in manufactured or other form

at the highest return to such growers consistent with their long term interests. In carrying out such purpose, Sunkist shall act as a nonprofit cooperative marketing association." [R. 130.][1]

1. Sunkist Growers, Inc.

Sunkist Growers, Inc., is the marketing agent for the Sunkist System. [R. 39.] The Bylaws of Sunkist provide that all of the fruit within the Sunkist System shall be marketed through the facilities of Sunkist, and that Sunkist

> ". . . shall determine the methods of marketing to be adopted in any or all markets and the types of containers and methods of packaging to be used." [R. 144.]

The Bylaws further provide that each of the packing houses (including the agency associations which are at issue in this case)

> ". . . appoints Sunkist as its agent and the agent of its growers in all matters concerning the marketing of its fresh fruit, and the processing and marketing of its products fruit[2]. Full power and authority are conferred upon Sunkist as such agent to conduct its marketing activities in such manner

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[1]Similar declarations of purpose are set forth in Sunkist's Amended Articles of Incorporation, adopted October 31, 1958 [R. 124], and in Sunkist's 1916 Articles of Incorporation. [R. 73.]

[2]Products fruit is the fruit which is involved in this case. It is fruit which, because of its small size, or due to the scarring of its skin, or for other reasons, is not sold in the fresh fruit market, but instead is used to make canned or concentrated orange juice, or other orange products.

as it, in its sole discretion, determines to be for the best interests of all of its members." [R. 144-145.][3]

Sunkist has adopted a general marketing plan for the marketing of oranges which applies to all oranges within the Sunkist System, whether they are supplied through cooperative associations, or agency associations. [Bylaws, para. 9.3, R. 145.][4]

Fresh fruit and products fruit are handled differently in the Sunkist System. This case involves products fruit. Sunkist is given general power to market all of the products fruit within the Sunkist System. [R. 149.] The Bylaws specifically provide that no member shall exercise any control over Sunkist with regard to either the processing or marketing of products fruit, or the conduct of the business of Sunkist. [R. 149.] Sunkist is given power in its discretion to establish pools for the processing and marketing of products fruit in which the identity of any particular lot of fruit furnished by a packing house will be lost. [R. 149.] Sunkist has the duty to provide for the equitable handling of freight charges on all products fruit, so that no shipper will be at a disadvantage by reason of his location *vis-a-vis* the Sunkist processing facilities. [R. 150.] Sunkist is obligated to return all proceeds of sale, less necessary operating and marketing expenses, to the person entitled thereto. [R. 150.]

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[3]Prior to 1958, similar provisions were contained in the Sunkist-District Exchange-Association Agreement, to which all agency packing houses were parties. [R. 50-51 and 56.]

[4]The references herein are to the 1958 bylaws. However, prior to 1958, similar marketing provisions were contained in the Sunkist-District Exchange-Association Agreement. [R. 48.] Prior to the 1958 changes, the local associations were not "members" of Sunkist, but a number of individuals, each nominated by a District Exchange, were the members of Sunkist. [R. 96.]

The powers of Sunkist with respect to the marketing of fresh fruit, which is not involved in this lawsuit, are generally similar although they differ in detail. [Bylaws, para. 9.1, 9.2 and 9.4; R. 144-149.] The Bylaws provide that each local association within the Sunkist System shall market all of the fresh fruit it processes through the District Exchange with which it is affiliated, and that each District Exchange shall market all of its fruit through the facilities of Sunkist. [R. 144.] Each of the local associations and District Exchanges designates and appoints Sunkist as its agent and the agent of its growers in all matters concerning the marketing of fresh fruit. [R. 144.] District Exchanges and local associations within the Sunkist System are specifically prohibited from soliciting business from the trade, or employing any solicitor or agent, or corresponding with any buyer for the purpose of promoting the sale of their fresh fruit. [R. 146.] Sunkist is given the right to pool all transportation costs on an equitable basis for fresh fruit shipped outside the state. [R. 147.]

In short, all growers who agree to market their fruit through packing houses which are members of the Sunkist System are committing themselves to cooperative marketing with other growers marketing through Sunkist, whether the particular packing house they are dealing with is an agency association or a cooperative association. The marketing powers and duties granted to Sunkist apply equally in either case; there is no distinction in the Bylaws between the various types of packing houses.

The fruit of the growers within the Sunkist System is marketed not by the packing houses, but by Sunkist. Where products fruit is involved, Sunkist has the final

authority with respect to all marketing and processing decisions. It has the right to pool the fruit of one packing house with that of another packing house, and to equalize transportaion charges, so that the benefits of the Sunkist processing facilities are available to all growers in the system. Every grower in the system markets on an equal basis, sharing the marketing opportunities with every other grower in the system.

Thus, the growers who market their fruit through the Sunkist system are in fact engaged in cooperative processing and marketing, as authorized by the Capper-Volstead Act, irrespective of the existence of the agency associations.

2. District Exchanges.

Intermediate between Sunkist Growers, Inc., and the packing houses in the Sunkist System are organizations which are called "District Exchanges." The District Exchanges are nonprofit membership corporations composed of the Sunkist packing houses within their particular areas. Their function is set forth in the Stipulation of Facts:

> "Each District Exchange is organized and operated to meet the peculiar local needs of its member packing house associations. In the job of marketing the fruit of its member associations, the District Exchange generally is in communication, through representatives furnished by Sunkist, with customers in the major markets throughout the United States. District Exchange personnel possess specialized sales knowledge applicable to the fruit produced in the area served by the particular District Exchange. They negotiate and

confirm sales for their member packing houses and arrange for the physical shipment of fruit to market." [R. 42.]

3. Packing Houses.

Neither the District Exchanges nor Sunkist has facilities for physically handling fruit. The actual handling of fruit throughout the marketing operation is by the packing house associations or, in the case of products fruit, by one of the products facilities (Exchange Orange or Exchange Lemon). [R. 42.] The function of the packing houses is described in the Stipulation. The packing house association

> ". . . normally sends its specialized crews into the groves to pick the fruit. When fruit is brought to the packing house, it is washed and graded. The fruit graded as products fruit is then diverted to a separate, so-called, juice fruit bin. The remaining marketable fruit is then either packed or put up as loose fruit awaiting sale on the fresh fruit market. When a sale in fresh fruit channels has been arranged, the fruit is shipped to the customer on a delivered price basis, or placed aboard the train or truck in the case of f. o. b. sales, or shipped to the selected auction or public sale markets . . . When the decision was made for any reason to divert fruit to products utilization (as distinguished from sale in fresh fruit channels) the Exchange Lemon or Exchange Orange was notified . . . and their trucks picked up the fruit for transportation to the appropriate processing plant." [Stipulation of Facts, R. 41-42.]

Thus, the functions performed by the packing houses in the Sunkist System (including the agency associations) are a part of the cooperative handling and preparing for market which is specifically authorized by the Capper-Volstead Act. The Sunkist Bylaws provide that:

> "Each Local Association [packing house] shall maintain appropriate agreements between itself and its growers which will provide for the delivery to such Local Association of all the fruit covered by such agreements." [R. 131.]

A typical agreement between an agency association and one of its growers is attached to the Stipulation of Facts as Exhibit B. [R. 70-72.] The agreement provides that on a cost plus fixed fee basis, the packing house will receive, process, grade, pack, and in an orderly manner market the growers' fruit. The agreement also provides that the packing house may pool the growers' fruit. [R. 70-71.] The agency house is the marketing agent for its growers. By reason of the fact that the agency houses which are involved in this lawsuit are members of the Sunkist System, the grower who signs such a contract in effect designates Sunkist as his marketing agent.

The claim of the Petitioner that the relationship between the grower and the agency house is one of simple purchase and sale is incorrect. Although the contract between the grower and the agency house uses some of the language of purchase and sale, the Stipulation of Facts does not.[5] That Stipulation describes the re-

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[5]Where the contract provides that the proceeds of the sale are returned to the grower, the courts uniformally hold that a marketing agency is established, not that a sale has occurred. See Argument, III, C. 4 *infra*.

lationship between the grower and an agency association in the following terms:

> "The packing house facilities of the Agency Associations *are made available* to producers on the basis of the fruit being packed for market at cost plus a fixed fee . . . Such Agency Association *furnishes its facilities and services* on an independent contract basis, wholly unrelated to net returns from the sale of the product handled." [R. 35-36; emphasis added.]

In short, all growers who market their fruit through the Sunkist System are fully engaged in the cooperative marketing and processing of their citrus fruit as growers. To paraphrase the language of the Capper-Volstead Act, those growers are acting together with the other growers in the Sunkist System in the collective processing, preparing for market, handling and marketing their fruit.

B. The Cooperative Marketing Activities of the Sunkist System Are Carried on Solely for the Benefit of Its Growers.

Sunkist Growers, Inc. "is organized and exists as a non-profit cooperative marketing association". [R. 125.] The District Exchanges are cooperative corporations. [R. 39.] The packing houses, however, are of three types. The vast majority (80.12% by number and 82.34% by volume [R. 34]) are cooperative in nature. A small number (4.97% by number, and 4.72% by volume) of the packing houses are owned and operated by individual growers and pack their own fruit. [R. 35.] Some of the packing houses (14.91% by number, and 12.94% by volume) are individually owned, or are private corporations or partnerships. [R. 35.] These packing houses, called "agency asso-

ciations", are the elements of the Sunkist System which are now under challenge by the Petitioner. The Stipulation of Facts provides that:

> "From an accounting standpoint, all members of the Sunkist System beyond the grower (with the exception of the Agency Association as hereafter noted) operate on a strict cost basis, remitting to the grower, through the channels of the System, all marketing proceeds in excess of reimbursement of actual costs and deductions or assessments for maintenance of authorized reserves or growers' capital. The Agency Associations return to their growers all of the proceeds of marketing over their actual cost plus the fixed fee per box." [R. 43.]

In that part of the Stipulation which describes the nature of the agency associations, the following undisputed facts are set forth:

> "The packing house facilities of the Agency Association are made available to producers on the basis of the fruit being packed for market at cost plus a fixed fee. **The Agency Association does not itself participate in either the gain or loss involved in marketing fruit through Sunkist beyond the recovery of its costs and fixed fee for packing.** Such Agency Association furnishes its facilities and services on an independent contract basis, wholly unrelated to the net returns from the sale of the product handled." [R. 35-36; emphasis added.]

Thus, it is abundantly clear that the cooperative marketing activities of the Sunkist System are carried on for the benefit of its growers, as is required by the Capper-Volstead Act.

SUMMARY OF ARGUMENT.

I.

CONGRESSIONAL OBJECTIVES IN THE CAPPER-VOLSTEAD ACT.

By the Capper-Volstead Act Congress wanted to encourage and promote, as well as to authorize greater unity of marketing of agricultural products. Furthermore, the Congressional intent was quite clear. The benefits of such collective marketing must accrue to the farmer.

Congress also made it clear that legal technicalities were not to invalidate the organization used by the farmer; the farmers could act in one or more associations, through one or more marketing agencies and have marketing agencies in common; the corporations could have capital stock or not, and the associations and their members could make the necessary contracts to carry out their purposes; Congress recognized that the cooperatives could continue to do business with existing middlemen, and that non-farmers might become shareholders of cooperative associations.

Congress also made clear what it did not want to accomplish: it did not want non-farmers to participate in the gain involved in collective marketing. The farmer should receive the economic benefits of the operation. In addition, the courts have recognized that Congress did not want the activities of the cooperative to exceed legitimate objectives. These objectives have been defined in the *Maryland and Virginia* and in the *Borden* cases.

II.

ACCOMPLISHMENT OF CONGRESSIONAL OBJECTIVES BY THE SUNKIST SYSTEM.

The Sunkist System is directly engaged in accomplishing those objectives outlined by Congress, within the limitations set by Congress and the courts. The Sunkist System collectively markets oranges grown by producers in California and Arizona; the participation in this organization by agency associations permits growers who are not members of cooperative associations to market their fruit through the Sunkist System and to obtain the same economic benefit which other growers marketing through Sunkist obtain. This redounds to the benefit of all of the other growers in Sunkist as well as the growers using the agency association, and results in greater "unity" of marketing effort as fostered and encouraged by Congress.

Furthermore, the economic benefits of the Sunkist marketing operation are returned to the grower. All growers of the System, including those acting through agency associations, receive all of the economic gain obtained by marketing through the Sunkist System. The agency association does not receive greater or lesser amounts for its services because of marketing through the Sunkist System, but all of such variation in return based upon the effectiveness of the Sunkist System accrues to the account of the individual grower.

As a result, the entire system, including the operation through agency associations, meets the limitations laid down by Congress. There is no participation in the benefits of cooperative marketing by non-growers.

III.

THERE IS NO ABUSE HERE WHICH REQUIRES A REMEDY.

The end result of the Sunkist operation, and its contracts with the agency associations, is a system of cooperative marketing which benefits the grower. The results are exactly what Congress sought to achieve.

The arguments of the petitioner are not persuasive. They do not deal with the economic consequences of the Sunkist System, but deal only with a narrow claimed technical defect in permitting the agency association to be a "member." Contrary to petitioner's assertion, there is no requirement in the Capper-Volstead Act that farmers must not receive the assistance of non-farmers in accomplishing the legitimate objectives of cooperative activity.

Although the agency associations are "members" of the Sunkist System, petitioner has made no showing that such membership has any economic effect upon the association, Sunkist, the growers, or the public generally which is not authorized by the Capper-Volstead Act or which is different from the growers' use of cooperative associations within the Sunkist System.

The agency association is, in fact, the marketing agent for the growers who deal through it, as authorized by the Capper-Volstead Act. In accordance with Congressional intention, the economic benefit of the marketing operation is delivered to the individual grower.

ARGUMENT.

I.

THE CAPPER-VOLSTEAD ACT IS AN EXPRESSION OF THE CONSISTENT AND LONG-STANDING POLICY OF CONGRESS TO FAVOR AND ENCOURAGE GREATER UNITY OF EFFORT BY FARMERS IN MARKETING OF FARM PRODUCTS.

A. A Sustained Legislative History for Three Quarters of a Century Has Declared and Reiterated the Congressional Policy Favoring and Encouraging Cooperative Marketing Organizations for Farm Products.

1. General Agricultural Marketing Acts.

The most succinct statement of the Congressional policy favoring agricultural cooperatives is found in the preamble to the Agricultural Marketing Act, which established the Farm Credit Administration in 1929:

> "It is declared to be the policy of the Congress to promote the effective merchandising of agricultural commodities in interstate and foreign commerce . . . (3) by encouraging the organization of producers into effective associations of corporations under their own control for *greater unity of effort in marketing* and by promoting the establishment and financing of a farm marketing system of producer-owned and producer-controlled cooperative associations and other agencies." (12 U.S.C. § 1141; emphasis added.)[6]

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[6]A subsequent statute may of course be considered for the light it throws on congressional intent in passing an earlier statute. *NLRB v. Allis Chalmers Manufacturing Co.*, 388 U.S. 175, 18 L. Ed. 2d 1123, 1130 (1967).

To carry out the same purpose, Congress established the Division of Cooperative Marketing in 1926 (7 U.S.C. § 451 *et seq.*). Specifically, producers collectively marketing their products were authorized to exchange past, present and prospective market information among themselves and with their common agents.

Section 5 of that enactment provided in part as follows:

> "Persons engaged, as original producers of agricultural products, such as farmers, planters, ranchmen, darymen, nut or fruit growers, acting together in associations, corporate or otherwise, in collectively processing, preparing for market, handling, and marketing in interstate and/or foreign commerce such products of persons so engaged, may acquire, exchange, interpret, and disseminate past, present, and prospective crop, market, statistical, economic, and other similar information by direct exchange between such persons, and/or such associations or federations thereof, and/or by and through a common agent created or selected by them." 7 U.S.C. § 455.

2. Legislative History of Sherman Act.

In 1890, when the Senate was considering adoption of the Sherman Act, an amendment was offered by Senator Sherman, for Senator George, to exempt certain "combinations between laborers" and "any arrangements, agreements, associations or combinations among persons engaged in horticulture or agriculture, made with a view of enhancing the price of their . . . products." (21 Cong. Rec. 2612; Appendix pp. 1-2.) That this amendment was not incorporated in the final

act resulted from a feeling of the author that it was not necessary[7] and assurances by senators in charge of the bill that "the act as written without that language in it meant exactly what was contained in the George Amendment."[8]

3. Farmer-Labor Exemption in Appropriation Acts 1914-1927.

Notwithstanding the belief of the authors of the Sherman Act as to its inapplicability to farmers' cooperatives and labor unions, there developed a series of prosecutions and threatened prosecutions of such organizations under both federal and state antitrust laws. By way of interim remedy for this problem, the Congress annually inserted a provision in the applicable appropriations bill designating the amount authorized to be spent by the Justice Department on antitrust enforcement and attaching thereto a proviso prohibiting the Department of Justice from expending funds "for the prosecution of producers of farm products and associations of farmers who cooperate and organize in an effort and for the purpose to obtain and maintain a fair and reasonable price for their products."[9] This practice extended from 1914 until 1927, out of an abun-

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[7]21 Cong. Rec. 2611.

[8]51 Cong. Rec. 9171, 9540; Appendix pp. 3-4; Sunkist has attached hereto as an appendix, excerpts from the legislative history of various statutes concerning cooperative marketing.

[9]38 Stat. 609, 652, Aug. 1, 1914; 38 Stat. 822, 866, April 3, 1915; 39 Stat. 262, 312, July 1, 1916; 40 Stat. 105, 155, June 12, 1917; 40 Stat. 634, 681, July 1, 1918; 41 Stat. 163, 208, July 19, 1919; 41 Stat. 327, 336, Nov. 4, 1919; 41 Stat. 874, 922, ch. 235, June 5, 1920; 41 Stat. 1367, 1411, ch. 161, March 4, 1921; 42 Stat. 599, 613, ch. 204, June 1, 1922; 42 Stat. 1068, 1080, ch. 21, Jan. 3, 1923; 43 Stat. 205, 217, ch. 204, May 28, 1924; 43 Stat. 1014, 1027, ch. 364, Feb. 27, 1925; 44 Stat. 330, 343, ch. 195, April 29, 1926; and 44 Stat. 1178, 1194, Feb. 24, 1927.

dance of caution, even after adoption of the Clayton and Capper-Volstead Acts.[10]

4. Clayton Act, Section 6 (15 U.S.C. §17).

In 1914, at the particular urging of the American Federation of Labor, Section 6 was added to the Clayton Act. That section provides:

> "Section 6. The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to prohibit the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purpose of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws."

Although the language of Section 6 was in some degree a delayed enactment of the George Amendment of 1890, it was only partially effective in that it failed to account for the substantial number of farmers' cooperative marketing associations which had been organized as

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[10]Mr. Johnson of Kentucky:

"I appreciate that Congress but recently passed an act relative to farmers. That act yet has to run the gauntlet of the courts; and, until it has done so, and until the act recently passed by the Kentucky Legislature, which enables the farmers to pool their products until they can get a fair price for them has been held good, this language ought to be carried as law in order to prevent prosecution of just such organizations as the one to which I have referred to in Kentucky, and which, I understand, exist in other States." (62 Cong. Rec. 5211 (1922).)

stock corporations because of the need for capitalization to obtain the necessary facilities to prepare for market and market their members' products.

The fact that the language lumped the organizational aspects of labor and farming organizations together apparently accounts for the limitation. A minority report, concurred in by Mr. Volstead, agreed with the established liberal policy of the Congress with regard to farmer cooperatives, but noted that

> "this section is likely to bring down upon them the Sherman Act with all its penalties. When legislation is enacted specifically exempting certain classes of organizations, district attorneys and courts are likely to construe the antitrust laws as rendering unlawful the activities of the classes of organizations not exempted." (House Report No. 627, Part 3, May 13, 1914.)

The minority report was prophetic. The prosecutions, investigations and threats of prosecution which followed made urgent the Congressional clarification and restatement of its policy in the Capper-Volstead Act.

B. The Fundamental Purpose of the Capper-Volstead Act Was to Benefit Farmers by Liberal Authorization of Marketing Cooperatives.

1. Background of Capper-Volstead Act.

The first attempt at legislative relief came with the introduction of the Hersman and Barbour bills in the House of Representatives in 1919. Hearings were had before the Judiciary Committee but no action was taken in Congress. These bills were essentially simple amendments of Section 6 of the Clayton Act to authorize the payment of dividends on stock or membership capital.

Referring to Section 6 of the Clayton Act, Mr. Hersman stated, "The Congress tried to help the farmer solve this problem, but they inadvertently used these words 'not having capital stock.'" He then alluded to the riders on the appropriations bills by stating "you have done everything that you could, when you found that your laws were inadequate to protect the farmers of this Nation, by giving these temporary laws, in the hope that he would not suffer. Now we are coming before you to ask you to clarify the situation of the farmer, so that he will know definitely where he is; so it will not be necessary to write on every bill a rider in order to give proper protection to farm organizations."[11]

It was clear from the intitial testimony of Messrs. Hersman and Barbour that the impetus behind the proposed legislation was activity such as the pending Federal Trade Commission investigation of the California Associated Raisin Co. Congressman Barbour reported that

> ". . . this is the second time—next month will be the second time within about six weeks that they [the Raisin Growers] have been brought over here to show cause why they should not be indicted. It is getting to be a pretty serious proposition with us." (House Hearings, H.R. 7783, page 9.)

Following this testimony, John D. Miller, on behalf of the National Board of Farm Organizations gave extensive testimony emphasizing additional pending prosecu-

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[11]Hearing of House Judiciary Committee on H.R. 7783, Oct. 1919, entitled "Collective Bargaining for Farmers," pages 5 and 6.

tions or threats of prosecution of farmer cooperatives under the antitrust laws. (House Hearings, H.R. 7783, page 19).

Another witness described pending investigations by the Department of Justice in the Philadelphia area. (House Hearings, H.R. 7783, page 94.) Further testimony covered antitrust litigation involving potato growers in Caribou, Maine. These investigations and prosecutions stimulated the consideration of the Capper-Volstead Act.

2. The Express Purpose of Congress Was to Authorize Wide Diversity of Form for Cooperatives.

The committee hearings and the debates in the House of Representatives and Senate indicate that the Congress had a rather full comprehension of the great variety of organizational forms which farmer cooperatives had taken throughout the United States. The discussion at no point indicated an intent to invalidate any of the organizations known to the Congress at that time, and in fact the contrary was clearly expressed in the House Committee Report.

> "The aim has been to make the provisions of the bill sufficiently liberal so that all cooperative farm associations operated in good faith for the benefit of their members might avail themselves of the provisions of this bill. The bill does not, however, compel any association to change its present organization nor does it create any new organization." H.R. Rep. No. 24, 67th Cong., 2d Sess. (1921).

What were some of the organizational forms of the cooperatives which were brought to the attention of the Congress? The hearing reports show the ex-

amination of many different cooperatives. Among others the raisin cooperative and Sunkist were discussed. These two are discussed below.

(a) *California Associated Raisin Company.* The California raisin growers had acquired control of approximately 70-90% of the raisins grown in the United States in 1922. Their association, California Associated Raisin Co., had been invesitigated thoroughly by the Federal Trade Commission. The F.T.C. concluded that in order to qualify under Section 6 of the Clayton Act, the association would have to make certain changes:

> (a) Eliminate capital stock, and substitute therefor a nonprofit sharing basis of providing financial resources. (In fact, approximately one-third of the capital stock of the raisin growers had been held by nonproducers, that is, by bankers and businessmen in the community.)
>
> (b) Eliminate profit to the corporation or its stockholders as profit on the operations of the corporation. (Under its bylaws, the association paid 8% as maximum return on capital stock. "Any profit remaining after setting aside a sum of money equal to 8% on capital stock, is distributed back annually to the sellers of raisin grapes on a pro rata basis proportionate to the tonnage delivered to the corporation by each individual grower.")
>
> (c) Membership or beneficial interest in the corporation would have to be restricted to actual growers of raisin grapes."[12]

The detail of the organization and operation of the raisin association was expounded at length by the at-

[12]F.T.C. Letter included in Senate Hearing, Appendix pp. 5-8.

torney for the remaining independent handlers in the industry, who had been fostering the F.T.C. investigation (Appendix pp. 9-10), by the attorney for the association (Appendix pp. 10-11) and by the president of the association (Appendix pp. 11-12).

Senator Walsh, who was one of the members of the subcommittee which held these hearings, subsequently made repeated references on the floor of the Senate to the California raisin association. Thus, after referring to the capital requirments of the raisin growers and the solution which they had used, he declared "it is such an organization as that that is contemplated here."[13]

In this regard, Senator Walsh noted that

> "under Section 6 of the Clayton Act an association can be protected only when it has a membership without capital stock; and it was intended to extend this to associations that have capital stock, but that did not pay more than 8% on that capital stock, the remainder of the avails to be divided exactly as the avails are divided among the associations organized under Section 6 of the Clayton Act." (60 Cong. Rec. 365.)

It is perhaps worthy of note that Senator Walsh's expression that it was the intent of Congress to cover organizations such as the raisin growers appears to have been confirmed by the fact that the Capper-Volstead Act specifically cured each of the three deficiencies in Section 6 of the Clayton Act as noted by the F.T.C. Thus, capital stock corporations are included, divi-

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[13]60 Cong. Rec. 365. (Appendix pp. 12-13.)

dends up to 8% are authorized, and beneficial interest in the association is satisfied if it is operated for the benefit of its members as producers.

(b) *Sunkist System.* The Sunkist System received more than casual attention in the Congressional debates (Appendix pp. 15-21). It was repeatedly cited in the Congressional debates as an example of sound co-operative marketing.

Senator Walsh, in 1922, stated:

> "I had occasion some years ago to make a very careful and exhaustive examination into the organization of the California Fruit Growers Associtation [Sunkist]. I am satisfied that it has made fruit growing a great and profitable industry, when it was of doubtful success, and I am confident that upon the whole, the people of the United States have paid less for citrus fruit than they would have paid if the products were not put upon the market by the present organization which it represents." (62 Cong. Rec. 2121.)

It is stipulated in this case that "by 1920, the corporate and functional pattern of the Sunkist System was established as it remained until October 31, 1958 [when the products companies were merged into Sunkist Growers, Inc.]." [R. 41.]

3. Congress Expressly Intended to Benefit the Farmer.

At the time that the Capper-Volstead Act was passed, the agricultural sector of our economy was suffering from a severe depression. Senator Walsh stated:

> ". . . it may doubtless be said, unfortunately, that perhaps there never was a time in the history of this country when this great, basic industry was

> suffering from such intense depression as prevails at the present time. . . . Anything which could be proposed to alleviate the present condition, characterized by the depression of which I have spoken, or which would tend to promote the welfare of the farming industry generally, even under normal conditions, ought to have the earnest consideration of members of this body, and it certainly has my sympathy." (62 Cong. Rec. 2121.)

Senator Capper was equally explicit:

> "The situation today is critical. It is dangerous. American agriculture has never reached so low an ebb as it has today." (62 Cong. Rec. 2059.)

Congress enacted the Capper-Volstead Act to benefit the farmer. The report of the House Committee on the Judiciary provided in part:

> "Section 1 defines and limits the kind of associations to which the legislation applies. These limitations are aimed to exclude from the benefits of this legislation all but actual farmers and all associations not operated for the mutual help of their members as such producers." (House Report No. 24, 67th Congress, 1st Session.)

In the debates on the prior bill, H.R. 13931,[14] Congressman Morgan had stated its purpose in these words:

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[14]In 1920, Mr. Volstead had introduced a bill which included the substance of the Capper-Volstead Act. It passed both the House and Senate, but the Senate added a prohibition against the acquisition of a monopoly. The Conference Committee was unable to agree and the bill died. In the 1922 debates, an amendment was again offered in the Senate prohibiting the acquisition of a monopoly. Senator Norris (and others) argued that one of the purposes of the bill was to permit a monopoly. (62 Cong. Rec. 2269.) This time the Senate defeated the proposed amendment by vote of 68 to 17, counting 24 paired votes. (62 Cong. Rec. 2281.)

"The object of the bill under consideration is to make it clear that persons engaging in the production of agricultural products may form corporations or associations, either with or without capital stock, and may engage in collectively marketing their products. In other words, Congress desires to encourage farmers in forming cooperative business organizations and to use such organizations as a means of promoting agricultural prosperity and adding to the profits of the business of farming. (59 Cong. Rec. 7851.)

"The national government should not only permit farmers' cooperative organizations, but should encourage them by both legislation and appropriations. Above all, there should be no uncertainty as to what the law is on the subject. I believe now, as I believed six years ago, that through cooperative business organizations farmers will get better prices for their products and pay less for the supplies they purchase and thus add largely to their net profits. . . . The excessive charges of unnecessary middlemen will be eliminated. . . . The producers and consumers will share equitably in the profits derived from cooperative business organizations among farmers. . . .

"[F]armers will be more prosperous, the cost of living will be reduced, and the general public welfare will be benefited." (59 Cong. Rec. 7852.)

Debate on the Capper-Volstead Act was opened in the Senate by Senator Kellogg; the objective was to benefit farmers:

"The main object of the cooperative association is to get reasonable prices for the farmer, prin-

cipally through lessening the cost of marketing and selling his products and cutting down the difference between what the farmer receives and what the public finally pays. That is the main object." (62 Cong. Rec. 2049.)

Senator Capper had the same view:

"Cooperation will give farm products to the consumer cheaper and at the same time yield larger returns to the man who produces by eliminating much of the excessive cost of distribution under the present system in which speculation plays so dominant a part. Furthermore, participation by farmers in the marketing of farm products through cooperative associations, giving them the right to bargain collectively with buyers, will result in stabilizing the market, preventing waste, and, as I have said, bringing about more efficient distribution . . . Today there is no legislation the enactment of which would accomplish greater good for this nation." (62 Cong. Rec. 2059.)

C. Congress Desired to Limit the Benefits of Cooperative Marketing to Farmers.

The speculative middleman was the object of Congressional ire.[15] Farm prices were depressed and consumer prices were inflated. "A farmer sells a bushel of wheat and is paid for a peck; the consumer buys a peck and pays for a bushel."[16]

Senator Capper said:

"The producer of food under the present system is compelled to see his products go on the market

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[15]See, *e.g.*, the statement of Senator Kellogg, *infra*, at p. 45.

[16]62 Cong. Rec. 2060 (Mr. Volstead.)

subject to the whims of speculators and gamblers. He knows from long experience that to function the speculator buys as low as he can force prices down, buys to the extent of his resources or the resources banks will lend him, and exerts a powerful control over the food supply of the nation between the time it leaves the hand of the producer until it reaches the consumer, at greatly inflated prices, utterly unjustified by the actual cost of their physical distribution. From the other side, the consumer sees the farmer receiving low prices for his products. . . . But he never buys them on the basis of what the farmer receives. In between, in addition to the reasonable compensation he is willing that the man who actually handles the products should receive, there is a wide margin representing the rake-off of the speculative middlemen.

"Mr. President, this annual tribute, gouged from the pockets of citizens already struggling with the problems of living and squeezed from commodities necessary to their existence is a national outrage—an evil that demands correction and it must be corrected." (62 Cong. Rec. 2059.)

It was of prime importance that the consumer not be charged unreasonable prices.[17] But it was equally important that farm products bring a return to the farmer roughly equal to the return produced by other business activities.

"The best way, the only feasible way, to bring this parity about, it seems to me, is to increase the

[17]The vast bulk of the argument in Congress related to the most effective means of implementing Section 2 of the Act, which is not in issue in this case.

producer's profit by shortening the road to market. The way to accomplish this is through cooperative marketing, which eliminates the unessential and speculative middleman, and which gives the producer and consumer their due."[18]

Precisely what Mr. Volstead meant by the foregoing general statement was demonstrated by the experience of the Sunkist System as he recited it:

"As a result of intelligent cooperative marketing the 11,000 members of a California citrus fruit-growing organization distribute $75,000,000 worth of their products annually to jobbers at a cost of less than 1½ per cent. It costs the individual grower from 7 to 10 per cent to do the same thing. Here is a saving of from 5½ to 8½ per cent, due to cooperation in the handling of one of the most expensive crops put on the market.

"There are already hundreds of small farm cooperative enterprises in every strongly agricultural State. They only need to be linked up to a cooperative marketing system to become a great blessing to the American people and to American agriculture." (62 Cong. Rec. 2061.)

Congress did not, however, go beyond limiting the benefits to the producers. It authorized marketing agents in common and contractual arrangements with non-producers; it authorized great flexibility of form; and it did not prohibit non-producer activity so long as the association was operated for the benefit of the producers.

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[18]62 Cong. Rec. 2060. (Mr. Volstead.)

D. Congress Did Not Place Limitations on the Kind of Organization a Cooperative Could Use.

1. Congress Intended to Authorize Any Kind of Organization Which Sought the Objectives of the Act in Good Faith.

The House Committee Report on the bill declared:

> "The aim has been to make the provisions of the bill sufficiently liberal so that all cooperative farm associations operated in good faith for the benefit of their members might avail themselves of the provisions of this bill. The bill does not, however, compel any association to change its present organization nor does it create any new organizations": H.R. Rep. No. 24, 67th Cong., 2d Sess. (1921).

This is in accordance with the language of the Act, which authorized farmers to use associations of any type: such associations might be "corporate or otherwise, with or without capital stock." The basic requirement is that the associations must be operated "for the benefit of the members thereof, as such producers."

Senator Capper argued in support of the house bill, and against the substitute proposed by the Senate Committee on the Judiciary, and stated:

> "The original bill—(a) authorizes and validates cooperative associations of producers *regardless of technical form, limited only by certain test requirements as to cooperative character.*
>
> "(b) permits them to develop their activities to a natural extent, which involves a tendency toward great commodity organization.

"(c) safeguards the public against any possible abuse by such cooperative marketing associations by appeal to and action by the Department of Agriculture." (62 Cong. Rec. 2057-2058; emphasis added.)

2. Congress Expected That Persons Who Were Non-Producers Would Become Shareholders of Cooperative Organizations.

One of the basic weaknesses of Section 6 of the Clayton Act had been that it did not provide a ready solution to raising the capital needed for harvesting, packing, processing and marketing the farmers' products. The requirement of nonprofit mutual operation assured compliance with the basic cooperative tenet of returning the maximum possible economic benefit to the producer.

The Congress recognized the problem of obtaining capital in the drafting of the Capper-Volstead Act. Two basic alternatives were made available:

(1) *Capital Stock* could be issued or other capital contribution obtained and dividends not exceeding 8% paid thereon. This involved adapting the law to the existing practice of the California raisin growers (Appendix pp. 7-8) and the Wisconsin cooperative statute.[19] By limiting the dividend to a

[19]Hearings on H.R. 2373, before the Subcommittee of the Senate Committee on the Judiciary, 67th Cong., 1st Sess., at p. 176; testimony of Chas. Holman. The Wisconsin cooperative "is created for service to members and not for profit to the corporation." To that end there is a limitation of dividends on capital stock, but it is recognized that in some types of cooperative organization it is necessary for farmers to have some capital stock. The Wisconsin law limits the dividends to 8% at the present time.

fixed amount, the grower is assured that the bulk of the proceeds and all of the benefit of the combined marketing power will be returned to him.

(2) *Necessary contracts* may be used to carry out the purposes of the cooperative. Thus, in the 1890's, Sunkist associations "arranged to have their fruit packed by [commercial] packers under contract." [R. 38.] So today, and in the period since 1920, those growers who market their fruit through agency associations have elected to utilize an agency contract to resolve their need for capital.

Such a grower is not burdened, as is the grower affiliated with a cooperative association, with "deductions or assessments for maintenance of authorized reserves or grower capital." [R. 43.] In lieu thereof, he pays in addition to the actual costs of packing a fixed fee per carton of fruit packed.

The limitations on dividends and voting rights were inserted to prevent non-growers from gaining control of a cooperative or from abusing control if they should gain it. At one point in the debates, Senator Promerene proposed an amendment that would require cooperative associations to conform to both the restriction on voting and the restriction on dividends. Senator Walsh, in arguing against this amendment, pointed out that certain of the cooperatives required capital for their operations, and for this reason they organized with capital stock:

> "It is recognized that in order to carry on the business of any of these cooperative associations they must have capital. Frequently the farmers themselves are unable to provide the capital.

So they go to a bank or to a merchant or to someone else who has money, and the banker or the merchant agrees to advance the necessary capital. *He thus becomes a stockholder* in the corporation where he can have no more than eight percent profit or return on his stock. . . .

[The] second clause is intended to permit them to go out and secure capital, but the profits which the *mere stockholder* gets are limited to 8 percent." (62 Cong. Rec. 2271-2272; Emphasis added.)

Senator Norris gave a similar explanation:

"It was not desired to make it necessary by the passage of this measure for any State to enact additional legislation; but where such a condition did exist we desired to prevent any idea of a monopoly or anything of that kind by allowing anyone to become a member of an organization and, then to control it under an arrangement by which he could have as many votes as he could buy shares of stock. Under such an arrangement some outsider, like Armour or any other big packer or Barnes or any big grain elevator man, could come in and buy a controlling interest in some small association and outvote the other members. That might happen if the conditions imposed in the first clause were not provided. To prevent that from happening and these cooperative associations being thus used for evil purposes we provided that they should in such cases never have a dividend of more than 8 percent. Do not the Senators see the object of that clause?" (22 Cong. Rec. 2273.)

Congress thus intended that non-growers could participate in a Capper-Volstead cooperative.

3. Congress Was Aware of the Fact That Cooperatives Would Continue to Do Business With Existing Middlemen.

Although Congress authorized farmers and fruit growers to establish vertically integrated cooperatives, from handling and processing to preparing for market and marketing of their product, farmers were not required to engage in all those activities. Fruit growers could thus use existing processing or marketing facilities where they desired. Senator Kellogg in opening the debate in the Senate, noted this. He pointed out that the marketing of a large crop was a difficult job:

> "This requires study, experience, and cooperation among the farmers. I do not say that the farmers are going to set up all their local stores and sell at retail everything. They will use, as they have in the great California Fruit Growers Associations, the marketing facilities already established; but they have their agents who understand the market, know where to ship, when to ship, and what kind of fruit to ship, and they guarantee quality and quantity; and today the buyer who buys a box of oranges or a barrel of potatotes knows what he is going to get." (62 Cong. Rec. 2052.)

II.

THE SUNKIST SYSTEM ACCOMPLISHES THE PURPOSES OF THE CAPPER-VOLSTEAD ACT WITHIN THE LIMITATIONS LAID DOWN BY CONGRESS AND THE COURTS.

A. The Sunkist System Constitutes a Single Association of Fruit Growers Within the Meaning of the Capper-Volstead Act.

Measured by the applicable substantive economic tests, the Sunkist System is an association of fruit growers operating in full compliance with Section 1 of the Capper-Volstead Act. It has known a broad diversity of organizational forms in the period since the 1890's, when its growers began to organize. There have been stock corporations [R. 39], and membership associations [R. 36]. There have been subsidiaries [R. 40-41] and direct ownership of facilities [R. 38]. There has been contract utilization of packing house facilities [R. 38] and grower ownership of those facilities [R. 38]. But in economic substance, the system has always been one federated association within the meaning of the Capper-Volstead Act.

This is perhaps best illustrated by this Court's opinion in the *Winckler & Smith* case:

> "[w]e feel that the 12,000 growers here involved are in practical effect and in contemplation of the statute one 'organization' or 'association' even though they formally organize themselves into . . . [separate legal entities] . . . That the packing is done by local association, the advertising, sales, and traffic by divisions of the area association, and the processing by separate organizations does not in our opinion preclude these growers from

being considered one organization or association for the purposes of the Clayton and Capper-Volstead Acts." (*Sunkist Growers, Inc. v. Winckler & Smith Co.*, 370 U.S. 19, 29 (1962).)

B. The Primary Objective of the Sunkist System Is the Cooperative Marketing of the Products of the Growers Who Receive the Benefits of the Sunkist System.

The aim and object of the Sunkist System is the orderly collective marketing of the oranges of those growers who receive the benefits of the Sunkist System.

The bylaws in effect at the time the present litigation was commenced provide as follows:

> "The general purpose for which the Exchange [Sunkist] is instituted is to furnish the facilities and agencies through which the citrus fruits and their by-products of its members and growers represented by them may be marketed and distributed upon a uniform plan and in such manner as to bring about a standard of quality, a more uniform distribution and larger consumption thereof in the markets of the United States and in other places." [R. 95.]

The amended Articles of Incorporation of Sunkist, adopted in 1958 following the merger of Sunkist, Exchange Orange Products Co. and Exchange Lemon Products Co., contains the following paragraph regarding the purpose of the corporation:

> "The primary purpose for which Sunkist is formed is to furnish facilities and agencies through which citrus fruits of its members and

other producers may be marketed or processed and marketed, and to return to said members or other producers the proceeds of sales, less necessary operating and marketing expenses, on the basis of the quality or value of citrus fruits marketed for such member or other producer." [R. 124.]

By the typical contract between a Sunkist grower and an agency association [Ex. B to Stipulation, R. 70] the grower agrees to deliver its fruit to the agency association, and the agency association agrees to receive, process, grade, pack and in an orderly manner, sell said fruit.

The association, in turn, appoints Sunkist as the marketing agent for the growers. Section 9.2 of the amended bylaws [R. 144] provides in part as follows:

"*Marketing agency created*—Each Local Association and District Exchange designates and appoints Sunkist as its agent and the agent of its growers in all matters concerning the marketing of its fresh fruit, and the processing and marketing of its products fruit."

All of the fruit which comes into the Sunkist System is marketed by Sunkist, as a cooperative marketing activity, for the benefit of the growers who produced that fruit. Each of the growers whose fruit comes into the system, whether as a corporate grower, through a cooperative association, or through an agency association, has its fruit marketed by Sunkist in the same manner.

C. The Benefits of the Sunkist Operation Are Returned Directly to the Grower Who Produced the Oranges.

As the amended Articles of Incorporation of Sunkist Growers, Inc. point out, the function of Sunkist is to market the fruit, "and to return to said members or other producers the proceeds of sales, less necessary operating and marketing expenses. . . ." [R. 124.]

The net proceeds of sale after deduction of expenses of marketing by Sunkist are returned to the association which originally received the fruit. The association in turn distributes the proceeds of sale to the grower who produced the fruit, less certain deductions.

As the stipulation between the parties points out,

> "From an accounting standpoint, all members of the Sunkist System beyond the grower (with the exception of the Agency Associations as hereafter noted) operate on a strict cost basis, remitting to the grower, through the channels of the System, all marketing proceeds in excess of reimbursement of actual costs, and deductions or assessments for maintenance of authorized reserves or grower capital. The Agency Associations return to their growers all of the proceeds of marketing over their actual cost plus the fixed fee per box." [R. 43.]

In each case, therefore, the grower receives all of the benefit of the Sunkist marketing system. If the oranges are sold at a better price because of Sunkist's operations, the grower receives one hundred precent of that increase in price. If, on the other hand, the market falls and the fruit is sold at a lesser price, the grower who produced the fruit must bear all of the loss of the de-

crease in price. Therefore, in accordance with the basic intention of Congress, the benefits of the cooperative marketing system are returned directly to the grower who produced the fruit. The rule is uniform throughout the Sunkist operation, and in every case the proceeds of the sale of the fruit are ultimately returned to the individual grower who produced the oranges.

D. The Limitations Laid Down by Congress and by the Courts Have Been Complied With by Sunkist.

1. Non-Growers Do Not Receive Any of the Benefits of Collective Marketing by Sunkist.

Not only does the grower receive the benefits of the Sunkist operation, or the "avails" as Senator Walsh denominated them (60 Cong. Rec. 365), but no one other than the grower participates therein. It is conceded that such is the case with respect to the cooperative associations and the corporate growers. (Pet'n. Br. 5.) So far as the agency association is concerned, the Stipulation makes this fact crystal clear:

> *"The Agency Association does not itself participate in either the gain or loss involved in marketing fruit through Sunkist beyond the recovery of its costs and a fixed fee for packing.* Such Agency Association furnishes its facilities and services on an independent contract basis, wholly unrelated to the net returns from the sale of the product handled." [R. 36; emphasis added.]

Furthermore, it is clear that the agency associations do not, in fact, receive anything from the Sunkist operation. It is true that the agency association recovers its costs plus a fixed fee for its services. However, such

payment is received specifically because of its contract with an individual grower, and does not represent a distribution by Sunkist to the agency association on account of any contribution the agency association has made to the Sunkist System, or on account of any profits which the Sunkist System has made. The funds which are delivered by Sunkist to the agency association are the proceeds of sale, and they are given to the agency association as agent and trustee for the grower whose fruit has been marketed by Sunkist.

2. Sunkist Does Not Market Non-Member Fruit in Appreciable Quantities.

The Stipulation between the parties does not specifically provide that any fruit is marketed through the Sunkist System as non-member fruit. It does show that, if any non-member fruit is marketed, it is a very small amount, and does not begin to approach the 50% authorization of the Act. [R. 34-35.] It also shows that no one is permitted to buy fruit produced by others and market it through the Sunkist System and thereby obtain the benefits of collective marketing. [R. 34 and 35.]

In each case Sunkist returns the benefits to the individual who produced the oranges. (As used in the Capper-Volstead Act, we believe the word "members" means those persons who receive the economic benefits of collective marketing, not those who are "members" in the corporate sense. See *Sunkist Growers Inc. v. Winckler & Smith Co.*, 370 U.S. 19 (1962). However, that issue is not material at this point because, by any test, the amount of non-member fruit is negligible.)

E. The Capper-Volstead Act Should Be Liberally Construed.

The Congressional history of the Capper-Volstead Act shows that Congress intended that the Act should be liberally construed. The House Committee report on the bill stated that,

> "The aim has been to make the provisions of the bill sufficiently liberal so that all cooperative farm associations operated in good faith for the benefit of their members might avail themselves of the provisions of this bill." H.R. Rep. No. 24, 67th Cong., 2d Sess. (1921).

The courts have recognized that similar Acts should be liberally construed. In *Interstate Commerce Commission v. Jamestown Farm, U.F. Co-op. T.A.*, 151 F. 2d 403, 404 (8th Cir., 1945) the Court discussed the Agricultural Marketing Act, 12 U.S.C. 1141 and stated, "But whether the interstate operator of such a truck is in an activity in which the farmers' cooperative is or is not permitted to engage presents a questions arising under the Agricultural Marketing Act, a remedial statute, entitled to liberal construction to effectuate the purpose for which it was adopted."

The definition of a cooperative association under the Agricultural Marketing Act is substantially identical to that in the Capper-Volstead Act.

The Court reached the same conclusion in *Northwest Agricultural Cooperative Association v. Interstate Commerce Commission*, 350 F. 2d 252 (9th Cir., 1965), when it declared at page 257:

> "The meaning which we ascribe to the term 'cooperative association' accords with the general purpose of the Agricultural Marketing Act. The

Act was intended to encourage the organization and operation of farm cooperatives; its terms are to be liberally construed to effectuate that purpose."

Where, as here, the primary aim of the operation is to market cooperatively the products of the producers involved, and where the benefits of that operation are returned to the producer and not to non-producers, the System has carried out the basic program which Congress wished to encourage, and has stayed within the limitations which Congress laid down. The addition of other limitations to the marketing system which were not contemplated by Congress, and which are not stated in the Capper-Volstead Act would be contrary to the original understanding and intention of Congress in passing the Capper-Volstead Act.

III.

THERE IS NO ABUSE INVOLVED IN THE PRESENT CASE, NOR ANY SITUATION WHICH REQUIRES A REMEDY.

A. The Capper-Volstead Act Does Not Prohibit the Farmer From Obtaining Assistance of Non-Farmers.

The primary position of Petitioner seems to be that the Capper-Volstead Act provides that "farmers" or "fruit growers" may act together in associations. Petitioner immediately concludes that it must follow that non-farmers may not assist in any way.

There is no support for Petitioner's position. No language in the Act prohibits farmers from obtaining whatever assistance they may need in order to carry out these functions from non-farmers. Quite to the con-

trary, the Act itself specifically mentions three areas where participation by non-farmers is contemplated:

(1) The Act permits the associations to have "marketing agencies in common." It is therefore intended that the associations may acquire marketing agencies, and that independent associations can contract with the same marketing agency.

(2) The "associations and their members may make the necessary contract and agreements to effect such purposes." If the associations and their members desire, therefore, to have outsiders assist them in this work, they may make the necessary contracts to do so without violating the antitrust statutes.

This Court described the limits of such contracts in *Maryland and Virginia Milk Producers Ass'n, Inc. v. United States,* 362 U.S. 458, 465 (1960), as those which sought the "legitimate objects" of cooperative activity. As the majority opinion below so clearly pointed out, the activities of the agency associations are legitimate and appropriate cooperative functions (369 F.2d at 462).

(3) The Act expressly recognizes that the associations may be organized into corporations which have stockholders, and, as the Congressional history reviewed above points out, Congress contemplated that those stockholders need not be growers. It did not place any limitation in the statute regarding stock ownership.

Occasionally, in Congressional debate, a speaker shows an uncanny clairvoyance on a particular situation which might arise in the future. Senator Kellogg considered *Sunkist's* use of existing marketing facilities!

In opening the debate on the Capper-Volstead Act in the Senate, Senator Kellogg prophesied:

> "I do not say that the farmers are going to set up all their local stores and sell everything at retail. They will use, as they have in the great California Fruit Growers Associations, the marketing facilities already established. . . ." 62 Cong. Rec. 2052.

Congress expected farmers and specifically Sunkist to use other marketing facilities.

Therefore, not only is there no exclusion of non-farmer assistance in the Capper-Volstead Act but the Act itself, and Congress, clearly contemplated that non-farmers would be involved.

B. Even the Legislative History Cited by Petitioner Shows That the Primary Test of Capper-Volstead Qualification Is Whether or Not the Economic Benefits Are Passed on to the Growers.

The legislative history cited by the Petitioner simply confirms what has been stated before: Congress wanted the economic benefit of cooperative marketing to go to the grower, and desired to encourage cooperative marketing so that the farmers of the country would be able to achieve bargaining equality with other businesses and industries, increase the efficiency of their operations, and increase their net return.

The passages relied on by the petitioner do not assert that the services of non-growers may not be used; indeed, they do not say that non-growers may not be "members"! Only two of the passages cited by the Petitioner deal directly with the question of whether or

not non-growers may receive the benefits of collective marketing, and these passages do not even discuss the question of "membership."

In the Kellogg-Cummins-Townsend exchange (62 Cong. Rec. 2052; Pet'n Br. 9-10), Senator Kellogg pointed out that the "privileges which the bill grants" are intended for the benefit of the "farmers, people who produce farm products of all kinds", and were not intended for the middlemen.

House Report No. 24, 67th Congress, First Session (Pet'n Br. 13), contains a similar passage:

> "Section 1 defines and limits the kind of associations to which the legislation applies. These limitations are aimed to exclude from the benefits of this legislation all but actual farmers and all associations not operated for the mutual help of their members as such producers."

Neither in the statute nor in the legislature history was Congress concerned with who was designated as a "member." In fact they show that Congress expected participation and assistance by non-growers, and even that "members" might have other interests. But the Act provides that the association shall be operated for the benefits of its members "as such producers." Sunkist does exactly that.

In other words, there are four principles which are consistent with all of the legislative history:

(a) The economic benefits of collective marketing should be returned to the producer.

(b) Those economic benefits should not be given to non-producers.

(c) The associations may contract with non-producers to carry out legitimate cooperative activities.

(d) There is no prohibition against having non-farmers as "members" in the corporate sense.

Direct comparison of the legislative history relied upon by the Petitioner, and the stipulated facts in this case affords the clearest kind of proof that the Sunkist System meets the requirements laid down in the legislation.

As shown by the Stipulation and Exhibit B attached thereto, the proceeds of sale of the fruit, that is the "benefits" of collective marketing, are returned directly to the grower who produced the fruit. Therefore, the "benefits of the legislation" go to the "actual farmers" and to no one else.

C. The Fact That Agency Associations Are Designated as "Members" Does Not Affect the Qualification of Sunkist Under the Capper-Volstead Act.

1. "Membership" of Agency Associations Has No Economic Significance.

Petitioner urges that the fact that agency associations are "members" causes the loss of the Capper-Volstead qualification. The only reason suggested is that such membership permits the agency associations to enjoy the benefits of collective marketing.

The facts show otherwise. The benefits of collective marketing are returned to the grower, not to agency associations.

Petitioner has failed to show any significance, *economic* or *otherwise,* to such membership. "Membership" is simply a contract between Sunkist and the

agency association. It is the technique by which the association carries out its duty to the grower in marketing his fruit.

Furthermore, we believe that for the purposes of the Capper-Volstead Act the "members" are the persons who receive the economic benefit of collective marketing. Practically speaking, the growers are the "members" of Sunkist. We often so refer to them. For example, this Court was familiar with the federated Sunkist structure in the *Winckler* case, and observed that there had been several references to Sunkist in the Congressional debates on Capper-Volstead, and that Sunkist was "then called California Fruit Growers Exchange and numbering 11,000 members. . . ."

Sunkist Growers v. Winckler & Smith, 370 U.S. 19, 28 (1962).

In that case, this Court also declared that the basic test was one of economic significance of the facts under consideration. The Court said,

> "There is no indication that the use of separate corporations had economic significance. . . .". (370 U.S. at 29.).

Here there is not even an argument that the "membership" of the agency association had economic significance. The facts show it did not.

2. The Use of Packing Houses in the Sunkist Structure Is a Practical and Reasonable Organizational Device.

The problem of organizing ten or eleven thousand citrus growers for purposes of marketing their fruit has many complexities. For efficiency, the organization must be broken down by functions or by geography so that all appropriate services can be per-

formed for each individual grower. The packing house is the obvious beginning point, because each grower must have his fruit brought to a packing house for purposes of washing, sorting, grading and packing, and as a central place from which shipment may be made.

3. The Agency Association Serves the Same Economic and Cooperative Purpose for Its Growers as the Cooperative Association Does for Its Growers.

As the Stipulation shows, about eighty percent of the fruit marketed by Sunkist comes into the Sunkist System from cooperative associations which own their own packing houses. Such cooperative associations are "members" of the Sunkist System, although they, *per se,* are not fruit growers. Petitioner directly concedes that having such cooperative associations as "members" is perfectly appropriate, and was, in fact, approved in *Sunkist Growers Inc. v. Winckler and Smith Citrus Products Co.,* 370 U.S. 19 (1962) (Pet'n. Br. 5).

Membership certificates are not issued to any "growers", yet the entire Sunkist organization is aimed solely at benefiting the grower. In each case the packing house is treated as the "member" representing its growers. What, then is the significant difference between using a cooperative association and an agency association as the organizational unit for growers whose fruit is marketed through that packing house?

The only effective economic difference between the use of a cooperative association and the use of an agency association is that the grower or growers who do not wish to put up the initial capital to create and maintain a plant for processing oranges for delivery

may contract with an agency association to supply that service and those facilities, and to act as marketing agent through Sunkist.

If a farmer doesn't have the capital to help build a plant, or believes he can contract for a plant more cheaply than building one, he should be permitted to do so. Congress wanted particularly to help the impecunious farmer, and to encourage efficiency in handling the product.

The agency association receives only a fixed charge for the services performed, and returns the net proceeds of the sales, after the deduction of the appropriate charges, to the grower. Thus, if the fruit is marketed at a higher price because of the joint marketing through the Sunkist System, that benefit accrues directly to the grower. It is the grower who still has the risk of loss on the sale of the fruit and has the opportunity for gain on the sale of the fruit.

4. The Agency Associations Are Not Dealing With Their Own Fruit, but Are Dealing With Their Growers' Fruit as Marketing Agents.

Petitioner asserts, in its Statement of the Case, that agency associations "purchase the oranges they market through Sunkist from growers for the consideration of *'cost plus a fixed fee'* per box of oranges." (Pet'r. Br. 7, Petitioner's emphasis.)

This statement is nonsensical, because the agency association is clearly not acquiring oranges by agreeing to pay its cost plus a fixed fee. No one would sell on such a basis. To the contrary, the stipulation of facts provides that the agency association receives these sums for its packing services. [R. 36.]

The fact that language of purchase and sale is used in the contract between the grower and the agency association [see R. 70] is of no particular significance in this case and has not been mentioned in the Petitioner's argument.

Whether or not there is a sale in the sense of the passing of title, it is clear that a marketing agency is created. As the facts in this case clearly demonstrate, the contract which a grower signs with an agency association designates that association, in the first instance, and ultimately Sunkist Growers, Inc. as his marketing agent.

This is in accord with recognized legal principles.

See, *e.g.*, *Irvine Company v. McColgan*, 26 Cal. 2d 160, 164 (1945);

Poultry Producers, etc. v. Barlow, 189 Cal. 278, 289 (1922); and

United States v. Rock Royal Cooperative, 307 U.S. 533, 580 (1938).

5. The Agency Association Is, in Fact, an Agent for Its Growers in Marketing the Growers' Fruit.

The Agency Association acts as the marketing agency for the growers who contract with it. It and Sunkist are "marketing agencies in common" for the various growers dealing through Sunkist. Such activity is expressly authorized by the Capper-Volstead Act.

D. The Majority Opinion of the Court Below on the Capper-Volstead Issue Is Accurate and Well Reasoned.

Petitioner has quoted at some length from the dissenting opinion in the Court of Appeal. (Pet'n Br. 15 and 17.) The quotations raise two points, both of which, we believe, are inaccurate. The dissent said (Pet'n Br. 15):

> "The principal reason offered by the majority in support of the view which I question, is its asserted belief that the question was settled in *Sunkist v. Winckler and Smith Co.* I do not so interpret that decision."

The majority quite accurately reviewed the *Winckler* case, and decided that it did not specifically decide the issue here in question, but determined that the general principles laid down in the *Winckler* case were applicable to this case. The majority specifically stated,

> "The District Court concluded, and we think correctly that under the decision of the Supreme Court in *Sunkist Growers, Inc. v. Winckler & Smith Co., supra,* Sunkist Growers Inc., is a cooperative organized in compliance with Section 1 of the Capper-Volstead Act. It is true, as Appellant argues, that this issue was not specifically raised in the Winckler case. . . ." (369 F. 2d at 460.)

The majority then reviewed the *Winckler* decision, and expressly considered the challenge to the Sunkist System based upon the existence of the agency associations. It reviewed the economic benefits of the Sunkist System, and who received them, and the contract au-

thority granted by the Capper-Volstead Act, and pointed out agency associations supply services which the growers require in handling their products. The court then stated that "This is not a case where the agreement in question goes beyond the legitimate objects of processing and marketing." Thus, the majority opinion directly applies the rules of *Winckler & Smith* and *United States v. Borden Co.* (369 F. 2d at 460-461.) It also pointed out that these were not "anti-competitive activities" which are outside the "legitimate objects" of the cooperative, as defined in the *Maryland and Virginia Milk Producers* case. (369 F. 2d at 462.) The majority opinion therefore accurately characterized and applied the three previous cases in recent years which the Supreme Court has decided under the Capper-Volstead Act.

The second inaccuracy in the dissenting opinion is the quotation from that opinion (Pet'n Br. 17) as follows:

> "The stipulation [Capper-Volstead Stipulation] does *not* say that the associations were independent contractors. It recites that they were 'members' of the Sunkist system." (Emphasis by dissenting Judge.)

The stipulation of fact provides in part as follows:

> "Such agency association furnishes its facilities and services on an independent contract basis, wholly unrelated to the net returns from the sale of the product handled." [R. 36.]

E. United States v. Borden Co., 308 U.S. 188 (1939) Has No Application to Determination of Capper-Volstead Qualification.

The petitioner herein, and, indeed the dissenting Judge below, seem to suggest that if agency associations are simply agents for the purpose of handling oranges, the *Borden* decision says that this is a conspiracy with an outsider which would cause the loss of the Capper-Volstead qualification.

First of all, it is clear that the *Borden* case was not concerned with the Capper-Volstead qualification. The Court recites that the cooperative was qualified under the Capper-Volstead Act, but held that a qualified cooperative still might engage in conduct which constituted an illegal restraint of trade. Therefore, the case does not treat the question of qualification at all.

The situation was similar in *Maryland and Virginia Milk Producers, Inc. v. United States,* 362 U.S. 458 (1960), where the qualification as a cooperative was not at issue or challenged. The gross misconduct there was not a factor in determining Capper-Volstead qualification.

However, quite clearly the *Borden* case was dealing with an entirely different problem. In that case, the Pure Milk Association was a qualified Capper-Volstead cooperative. It was charged with a conspiracy with several major distributors, a labor union, a bottle exchange, a milk dealers' association and other persons. The complaint charged that all of these people and organizations had conspired to impose prices upon all dis-

tributors of milk in the Chicago area. This included an attempt to fix the price of milk paid by any distributor to any producer, as well as the price charged by distributors on the resale of the milk. Thus, the parties were charged with a conspiracy to fix prices for anyone dealing in milk in the Chicago area.

Sunkist is not dealing in nor attempting to set the price of fruit grown by anyone other than growers who directly receive the benefits of the cooperative marketing.

IV.
CONCLUSION.

The Petitioner concludes its brief with a suggestion that because of the possible abuses which might exist in other cases, the growers who have banded together in this case for cooperative marketing should be deprived of the benefits of the Capper-Volstead Act, *solely* because certain non-growers have been issued membership certificates. Yet these growers, including those who market through agency associations, are doing the very thing which Congress desired to encourage.

To paraphrase the language of this Court in *Sunkist Growers Inc. v. Winckler & Smith Citrus Co.*, the issuance of such membership certificates is a matter of "de minimis" importance. Such certificates do not have economic significance. This is not a case where the cooperative has been operated for the benefit of its members, as packing houses.

The Sunkist System complies with both the letter and the spirit of the Capper-Volstead Act, and the judgment of the Court of Appeals should accordingly be affirmed.

Respectfully submitted,

CHARLES E. BEARDSLEY,
SETH M. HUFSTEDLER,
DONALD D. STARK,
Attorneys for Respondent Sunkist Growers, Inc.

DALE V. CUNNINGHAM,
Of Counsel.

APPENDIX

LEGISLATIVE HISTORY.

A. Sherman Act

On March 24, 1890, with the Senate sitting as a committee of the whole, in answer to inquiry from Senator George, Senator Sherman expressed the view that the proposed Sherman Antitrust Act would not affect associations of farmers or laborers.

> "It does not interfere with the Farmers' Alliance at all, because that is an association of farmers to advance their interests and to improve the growth and manner of production of their crops and to secure intelligent growth and to introduce new methods. No organizations in this country can be more beneficial in their character than Farmers' Alliances and farmers' associations. They are not business combinations. They do not deal with contracts, agreements, etc. They have no connection with them. And so the combinations of workingmen to promote their interests, promote their welfare, and increase their pay if you please, to get their fair share in the division of production, are not affected in the slighest degree, nor can they be included in the words of intent of the bill as now reported."
>
> (21 Cong. Rec. 2562.)

The following day, however, after stating that "I do not think it necessary" (21 Cong. Rec. 2611) he offered an amendment, attributed to Senator George, to Section 1 of the Act, which after clarification read:

> *"Provided,* That this act shall not be construed to apply to any arrangements, agreements, or com-

binations between laborers, made with the view of lessening the number of hours of their labor or of increasing their wages; nor to any arrangements, agreements, associations, or combinations among persons engaged in horticulture or agriculture, made with a view of enhancing the price of their own agricultural or horticultural products."

(21 Cong. Rec. 2612.)

The entire bill was referred to the Judiciary Committee, and when it returned to the Senate, the George Amendment, along with many others, was missing.

Although the Congressional Record of 1890 is not entirely clear as to the reasons for deletion of the George Amendment, subsequent statements by members of the Congress have set the record straight. During the debates in the House of Representatives on May 23, 1914, Mr. Sherwood of Ohio furnished the following statement on the subject:

"On February 28, 1890, Fifty-first Congress, Senator Sherman, of Ohio, introduced his antitrust bill in the Senate. It was referred to the Committee on Finance. On March 22, 1890, the Committee on Finance introduced a substitute for the Sherman bill. On March 25, 1890, Senator Morgan, of Alabama, moved to commit the bill to the Judiciary Committee; it failed to carry on a vote of 16 ayes to 28 nays. On March 25, 1890, Senator Sherman offered a priviso to be added at the end of the first section of the bill, as follows:

"*Provided,* That this act shall not be construed to apply to any arrangements, agreements, or combinations between the laborers, made with a view of lessening the number of hours of labor or the

increasing of their wages; nor to any arrangements, agreements, or combinations among persons engaged in horticulture or agriculture, made with a view of enhancing the price of agricultural or horticultural products.

"The amendment was agreed to in the Senate without any opposing votes.

* * *

"The amendment to the act above referred to was made while the Senate was sitting in Committee of the Whole. On March 27, 1890, discussion of the bill was resumed upon the proviso exempting farmers' organizations and trade-unions from the act. The debate that day on that subject is worth more than passing attention. Senators Hoar, Edmunds, George, Sherman, and many others participated. Finally Senator Walthall, of Mississippi, moved to refer the bill and the amendment to the Committee on the Judiciary with instructions to report to the Senate within 20 days. The motion carried by a vote of 31 ayes to 28 nays.

"On April 2, 1890, the bill was reported to the Senate by the Committee on the Judiciary, but the Sherman-George amendment, which had been agreed to in Committee of the Whole on March 25, was not included in the bill. Nevertheless Senators in charge of the measure assured representatives of farmers' organizations and the trade-unions that under no possible construction would the judiciary include such organizations under the provisions of the act."

(51 Cong. Rec. 9171, emphasis added.)

Later in the Clayton Act debates, Mr. Henry of Texas observed as to the Sherman Act history that:

> "The amendment was agreed to without opposition. A little later in the proceedings the bill with amendments was referred to the Committee on the Judiciary, and when the committee reported it back to the Senate the George amendment was left out, because *all agreed that the act as written without that language in it meant exactly what was contained in the George amendment.*"
>
> (51 Cong. Rec. 9540, emphasis added.)

B. Capper-Volstead Act

1. General

The legislative record of the Capper-Volstead Act includes action on the following:

H.R. 7783 (Hersman), 1919, 66th Cong. 1st Sess.

H.R. 7784 (Barbour), 1919, 66th Cong. 1st Sess. (amending §6 of Clayton Act to authorize stock and dividends)—Hearings by House Judiciary —no report

S. 845 (Capper), 1919, 66th Cong. 1st. Sess. (companion bill to H.R. 7783 and 7784)—no hearings or action

H.R. 13931 (Volstead), 1920, 66th Cong. 2nd Sess.

House Report 939; Passed House 5-31-20; Senate Judiciary Report 655 [with amendments]; Passed Senate; Conferees fail to act (differences re enforcement under §2.)

S. 4344 (Capper) 66th Cong., 2nd Sess. (companion bill to H.R. 13931), hearings before Judiciary.

H.R. 2373 (Volstead), 67th Cong. 2nd Sess. S. 983 (Capper), 67th Cong. 2nd Sess. (Companion bill)

(expands "such products of their members" to "such products of persons so engaged" and adds marketing agents in common and necessary contracts.) Passed by House (May 4, 1921) and Senate (February 8, 1922.)

2. California Associated Raisin Co

a. *Nature of Organization and Operations*

(1) *F.T.C. Report of June 8, 1920:* Included in the report of the Senate Hearings in 1921 was a recent report by the Federal Trade Commission, which recited, in part as follows:

"FEDERAL TRADE COMMISSION, *Washington, June 8, 1920.*

"Sir: On September 30, 1919, you requested the Federal Trade Commission to make an investigation of the California Associated Raisin Co. (hereinafter called the Raisin Co.) and to advise you whether that company, first, 'is obtaining and maintaining more than fair and reasonable prices for its products; and, second, (under sec. 6 (c) of the Federal Trade Commission act), to make recommendations for the readjustment of the business of said corporation in order that the corporation may hereafter maintain its organization, management, and conduct of business in accordance with law. . . .'

"In compliance with your request the Federal Trade Commission instituted an inquiry, giving notice thereof to the Raisin Co., in the course of which a large amount of testimony was given, a

transcript whereof accompanies this report to you. . . . The essential facts disclosed and the conclusions and recommendations of the Federal Trade Commission thereon are now submitted for your consideration.

"Before proceeding to the examination of the two questions propounded by the Attorney General to the Federal Trade Commission a general statement with respect to the raisin industry may be useful for the purposes of an understanding of such a discussion.

"THE CALIFORNIA ASSOCIATED RAISIN CO. AND THE RAISIN INDUSTRY.

"The raisin industry in the United States is at present practically confined to a district within a radius of less than 50 miles around Fresno, Calif., where conditions for growing, but more particularly for curing raisins, are peculiarly advantageous. Prior to the organization of the Raisin Co. the raisin growers were virtually at the mercy of those engaged in the business of packing and selling raisins, and realized from their efforts a varying and uncertain return in the marketing of their crops. Those packers being in control of the purchasing power, secured to themselves the larger profit, while the grower frequently failed to realize the cost of production.

"Seeking to remedy this condition, the growers repeatedly attempted cooperative organizations, which failed largely because the form of the various organizations did not include adequate provision for finance and credit. Other devices were

attempted without success and until the organization of the Raisin Co. the condition of the growers was, to say the least, unfortunate.

"Whether there was or was not a combination, or agreement without actual combination, among the packers who were then the purchasers of the raw supply, is immaterial to this inquiry. The inequality of their situation forced the growers to enter the contest for control, at least so far as control was necessary, for the protection of their individual interests. This effort on the part of the growers has unquestionably been successful. The question now presented is whether the effort has outrun its proper bounds and in turn become a cause of oppression.

. . .

"PRESENT ORGANIZATION, MANAGEMENT, AND CONDUCT OF BUSINESS.

"The California Associated Raisin Co. was organized and incorporated in 1912 under the laws of the State of California, with a total authorized capital stock of $1,000,000, consisting of 10,000 shares of a par value of $100 each.

"The ownership of the corporation is evidenced by common stock which, with respect to the original issue and assignment, is not limited to raisin growers or other agriculturists, but which in fact was originally subscribed for and purchased by merchants, professional men, and others as well as by vineyardists. On September 24, 1919, nongrowers to the number of 853 held 2,553½ shares of stock and growers to the number of 2,454 held 7,765½ shares of stock, of the par value of $100

each, the total number of stockholders being 3,307, the total number of shares outstanding being 10,319. The company then had a paid-in capital of $1,031,900 and a surplus of $323,568.76.

"Under a plan in operation subsequent to September 24; 1919, some 6,000 growers who have been selling their raisins under contract, but who have not been stockholders, are to be paid in part in stock of the corporation, which plan, if carried to conclusion, will increase the number of growers connected with the corporation, making the holdings of 1,000 nongrowers amount to approximately 265,000 shares of $1 par value and the holdings of 9,000 growers amount to approximately 1,425,650 shares of $1 par value, making a total paid-in capital of $1,690,650 and a surplus of $323,568.76:

"The capital stock is permitted to earn and distribute a dividend dependent upon the profitableness of the corporation's operation from year to year, with the limitation that there shall not be charged to any year's operations a dividend which will yield more than 8 per cent of the par value of the stock.

"After certain provisions for surplus to provide working capital have been complied with, any profit remaining after setting aside a sum of money equal to 8 per cent on the capital stock, is distributed back annually to the sellers of raisin grapes on a prorata basis proportionate to the tonnage delivered to the corporation by each individual grower."

(Senate Hearing,[1] H.R. 2373, pp. 9-12.)

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[1]Hearings before a Subcommittee of the Judiciary Committee, United States Senate, 67th Cong. on H.R. 2373, June 2, 7, 9, 11 and 20, 1921, entitled "Authorizing Association of Producers of Agricultural Products."

(2) *Testimony of John W. Preston,* attorney for competitors of California Associated Raisin Co.:

"Mr. Preston. The California Associated Raisin Co. is a commercial corporation in form. It was incorporated in 1912 by a few men, some of whom were raisin growers and others of whom were ordinary business men, such as merchants and bankers.

. . .

Mr. Preston. The plan of their organization on its face is a commercial corporation, with the same powers that any other ordinary commercial corporation would have. It does not claim to be a cooperative concern within the meaning of the California statute or within the meaning of the term as ordinarily understood. They do claim that they are cooperative in spirit, and by that they mean that they take over the crop from the grower by a long-term contract, and pool and grade it, seed and pack it or process it, and sell it, and then return to the growers all the net proceeds save and except 8 per cent on the capital and one-fourth of a cent a pound for surplus and betterments.

Senator Walsh of Montana. Then they make these contracts, apparently, not only with the stockholders of the corporation, but with people outside of the stockholders?

Mr. Preston. Yes, sir.

Senator Walsh of Montana. Now, let me inquire: You said that the stock was held by growers and by business men?

Mr. Preston. Yes. I will deal with that, if you will allow me, in this way. When this proceeding was begun in September, 1919, by the Attorney General before the Federal Trade Commission, the concern had contracts with 9,000 growers. Only 2,454 of them were stockholders. Eight hundred and fifty-three stockholders were ordinary businessmen who were nongrowers of raisin grapes. . . ."

(Senate Hearing, H.R. 2373, pp. 7, 17.)

(3) *Testimony of Carl E. Lindsay,* attorney for California Associated Raisin Co.:

"Before 1912, or before 1913, really, the growers were compelled to carry their raisins to these various packers, who had them absolutely at their mercy, and they having power which they did not hesitate to exercise in many ways . . . it simply meant bankruptcy to the raisin producers. They were not getting the cost of production. So there were several efforts made to organize, in order to escape the intolerable conditions that were prevailing.

"All of these efforts were futile because of the fact that in the peculiar raisin industry it is absolutely necessary that there should be a certain amount of capital employed. The packing houses have to be built, and property acquired, and seeding plants and seeding machinery and other machinery would have to be purchased and put up; and so finally, to make this part of the story short, the California Associated Raisin Co. was organized under practically the present plan—a capital stock corporation. This stock was sold—not all of it—to growers. Some of it was purchased by other

people interested in the district, bankers and merchants and others; and while they are not raisin producers, in a sense they are almost as much interested in a proper solution of this problem as the raisin producers themselves. . . . This money which they paid for their stock, after all, amounts to nothing more than a loan. It never was intended as a profit corporation at all, and the 8 per cent now which is paid by way of dividend to the stockholders is, after all, nothing more than what you might call interest for money loaned."

(Senate Hearing, H.R. 2373, pp. 43-44.)

(4) *Testimony of Wilie M. Griffin,* president of California Associated Raisin Co. His testimony covers over 40 pages of the hearing record, and gives a detailed account of the operations and structure of the raisin growers' organization. There was extensive questioning by Senator Walsh and other members of the subcommittee. The following excerpt is particularly pertinent to an understanding of the history of this association:

"It took quite a while to do it, but it was there that the idea of a capitalized company originated, to do ourselves what we had tried to get the packers to do for us; and it was out of that that the California Associated Raisin Co. grew, with a million dollars of capital. It was first called The Million Dollar Co., because we believed that anybody that had a million dollars—it looked so big to us that we believed that anybody that had a million dollars—could do anything they wanted.

"So we organized among ourselves the 'Million Dollar Co.' with the purpose of buying our own

crops. Like lifting yourself by your own bootstraps, it seemed almost an impossible task, but we did it anyhow, and after a long campaign we got $750,000 of the $1,000,000 subscribed. We got hardly any of it in money, because we did not have any money. I think out of the $750,000 we got about $250,000 or possibly $300,000 paid in real money, and the balance was paid in growers' notes covering a term of three years, one-third each year, on the instalment plan.

"At the same time, while it was independent, we formed a stock company and sold stock, most of it to the growers, probably 80 per cent of it to the growers; but it was a community affair. We did not confine the sale of stock to the growers. We sold some little to the bankers. I think the Fresno Clearinghouse Association, which was the organization representing the five banks of the city, took $15,000 worth of stock. The principal merchants took a thousand or two thousand dollars' worth of stock. The whole amount of stock that was sold outside of the growers was probably 20 per cent of the whole. I do not know the exact figure now, but I think it was about 20 per cent of the whole."

(Senate Hearing, H.R. 2373, pp. 97-98.)

(5) *Senate Debate.* There were repeated references to the raisin growers' association in the debates in the House and Senate:

Senator Walsh:

"The matter is illustrated, for instance, by the raisin growers' association in the State of Cali-

fornia. Here are a lot of people engaged in the business of growing raisins. The organization of this association and the establishment of agencies throughout the United States, as they have them, with bonded agents and with warehouses and all that kind of thing, calls for the investment of capital. Some of the members of the association are rich enough to take some capital stock. Others are not rich enough to do that. So those who are rich enough put in money in order to provide the necessary capital for the operation, and on that money capital thus contributed they get 8 per cent annually, and the rest of the profits of the business are divided ratably among the members; and it is such an organization as that that is contemplated here.

Mr. Smith of Georgia. And the 8 per cent limitation is intended as a protection to the membership who are not capital owners against the membership which may be large capital owners.

Mr. Walsh of Montana. Exactly; the Senator is correct about that. Now, under section 6 of the Clayton Act an association can be protected only when it has a membership without capital stock; and it was intended to extend this to associations that have capital stock, but that did not pay more than 8 per cent on that capital stock, the remainder of the avails to be divided exactly as the avails are divided among the associations organized under section 6 of the Clayton Act."

(60 Cong. Rec. 365.)

(6) *Failure to Qualify Under Section 6 of the Clayton Act.*

"By this section three classes of organizations are given certain exemptions under the antitrust laws. The Raisin Co.'s primary objects are such that that company may be brought within one of those classes. We purpose, now to show what changes are necessary to readjust it for inclusion therein, whereupon it could conduct its business in accordance with law.

"To conform to the legal requirements of an agricultural or horticultural organization instituted for the purposes of mutual help, the Raisin Co. must take the necessary legal steps to accomplish the following results:

(a) The elimination of capital stock and the substitution therefor, if necessary, of a nonprofit sharing basis of providing financial resources.

(b) The elimination of profit to the corporation or to its stockholders, as profit on the operations of the corporation.

(c) The restriction of membership or beneficial interest in the corporation to those whose interests are identical, i.e., to actual growers of raisin grapes."

(F.T.C. Report, Senate Hearing, H.R 2373, p. 14.)

(7) *Qualification Under Capper-Volstead Act:*

"House bill 2373, in its present form, would legalize the above institution; in fact the provisions of the bill would seem to have been drawn specifically to legalize such a concern. This concern limits its dividends on capital stock to 8 per cent."

(Statement by Mr. Preston, Senate Hearing, H.R. 2373, p. [illegible]2.)

"The matter is illustrated, for instance, by the raisin growers' association . . . and it is such an organization as that that is contemplated here."

(Senator Walsh, 60 Cong. Rec. 365.)

3. Sunkist System

There were at least a dozen specific references to the Sunkist System (generally called "California Fruit Growers' Association" or similar names, due to its then corporate title of "California Fruit Growers Exchange"). These may be roughly categorized as follows:

a. *Approval of Overall Economic Effect*

Senator Walsh:

"Indeed, everyone concedes that so far as they have yet gone in this country their operation has been wholly beneficial. Take the great California Fruit Growers' Association. It furnishes to the country a constant supply of the citrus fruits that it markets. The raisin growers organized an association whose operations were under consideration by the Federal Trade Commission, which reported that whether it was a combination coming under the Sherman Act or not, no harm had been done to the public, up to the time the investigation occurred at least, by reason of its operations."

(60 Cong. Rec. 373.)

Senator Capper:

"Mr. President, cooperative marketing by farmers is not theory. It has proved successful despite handicaps wherever it has been attempted. The various citrus fruit growers' associations in California have been a boon to the producers. They have

eliminated, to a large extent, the speculator, but they have not injured the legitimate middlemen who perform a necessary service in the process of distribution, and no one wants to eliminate him or deprive him of a fair profit. They have brought greater returns to the producer, while the consumer has not been asked to pay more."

(62 Cong. Rec. 2059.)

Senator Capper:

"As a result of intelligent cooperative marketing the 11,000 members of a California citrus fruit-growing organization distribute $75,000,000 worth of their products annually to jobbers at a cost of less than 1½ per cent. It costs the individual grower from 7 to 10 per cent to do the same thing. Here is a saving of from 5½ to 8½ per cent, due to cooperation in the handling of one of the most expensive crops put on the market."

(62 Cong. Rec. 2061.)

b. *Use as an Example*

Senator Walsh:

"I have indicated to the Senate that at the present time vast cooperative associations are actually in operation . . . The California Fruit Growers' Association has been operating for something like 15 years.

(62 Cong. Rec. 2122-23.)

Senator Walsh:

"I think if the Senator attends to the language he will appreciate that the purpose is not to limit any of these associations in the amount of actual profit. They first contemplate the organization of an as-

sociation without any capital stock at all. The members, just the members, turn in all their products together. They have no profits in the ordinary sense of the term, but they divide up whatever comes in in proportion to the amount which each contributes to the general fund; that is, the general fund of products. Take the Fruit Growers' Association, for instance. They are all single members with no stock whatever. One member contributes 1,000 boxes of fruit, another contributes 2,000 boxes of fruit, another 5,000 boxes of fruit, and the total amount is sold and the expenses paid and the avails distributed in proportion to the amount which each one has contributed. That is the first plan of operation."

(62 Cong. Rec. 2271.)

Senator Kellogg:

"I do not think that one organization should be required to take everybody into its fold. Take the California Fruit Growers' Association, which the Senator from Montana has mentioned. I believe he stated that about 7 per cent of the fruit growers are outside of that organization. That 7 per cent ought to be allowed to stay out and to sell their products individually or collectively or in any way they please."

(62 Cong. Rec. 2267.)

c. *In Recognition of Its Organizational Characteristics*

Senator Walsh:

"I had occasion some years ago to make a very careful and exhaustive examination into the organization of the California Fruit Growers' As-

sociation. I am satisfied that it has made fruit growing a great and profitable industry, when it was of doubtful success, and I am entirely confident that upon the whole the people of the United States have paid less for citrus fruits than they would have paid if the product were not put upon the market by the present organization which it represents."

(62 Cong. Rec. 2121.)

Senator Walsh:

"Such federation is already in operation and most beneficently so in the case of the California Fruit Growers' Association. I refer not to the California Raisin Growers' Association, of which mention has been made, but to the large cooperative association of the State of California which markets the citrus fruit product of that State. It has this kind of organization: There are local associations organized substantially as the associations contemplated and provided for in the bill are to be organized. Those associations are federated into a district association, and the district associations are federated into a State association. The State association has a common marketing agency in all the great cities. So that all the various local associations thus have one common marketing agency, but they federate themselves, and thus they secure added advantages by reason of the cooperative principle."

(62 Cong. Rec. 2277.)

Senator Thomas:

"I have been greatly impressed with the usefulness and benefits of the fruit growers' associations in California. It has seemed to me their very

success—and perhaps that is the principal reason why the Nonpartisan League has never been able to effectuate any sort of hold in the agricultural and horticultural sections of California—and, I think, the efficiency of the citrus growers' association, taking that as an example, is due to the fact that it acts independently of the raisin producers' association or of the olive growers' association, and so forth. That their distinctive energies, in other words, apply wholly and fully to one product is the secret of their great success. If they were to combine, as they could combine under a bill of this sort, I think they would cease to be popular on the one hand and I am inclined to think that their usefulness would be contracted upon the other."

(60 Cong. Rec. 315.)

d. *Reflecting Operating Practices*

Senator Kellogg:

"Look at the condition in California. I can remember only a few years ago when the fruit producers of California were bankrupt all the time. They had no facilities for marketing their products and no agents to furnish the products to the country as the country required them. There were no storage facilities and no coordination, but each man proceeded to dump his stuff upon the railroads. Consequently the markets were glutted; people could not buy all the products when they were glutted; and at other seasons of the year they had to pay enormous prices and many times could not get fruit. Now the producers have real scientific, businesslike organizations. They have built

their own warehouses for the handling of their fruit; they have their own agents; they guarantee deliveries of good oranges and other fruit so that any man can buy from one of those farmers' organizations and know that the product will be good. The same thing to some extent applies to apples. The result has been that the public has paid less according to the standard prices of the country, and the producer has received more. It will be found to-day that the difference between what the fruit producer receives and what the consumer pays is less than applies in the case of most other products. It represents a small, fair profit over and above the actual handling cost. Why? Because they have their skilled agents."

(60 Cong. Rec. 360-61.)

Senator McCumber:

"I ask the Senator if he thinks the action of the California Fruit Growers' Association, for instance, in advising the fruit growers to raise a kind of fruit which would be marketed at such a time as would not conflict with the fruit grown in Florida, would be guilty of an offense against the Sherman antitrust law; or if they advise, under the present situation, to withhold their products from market for better prices, or until the products have been sold in other sections of the country, would be a violation of any antitrust law?

Mr. King. I think not."

(60 Cong. Rec. 312.)

Senator Kellogg:

"The language is:

'Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged.'

The object of that, of course, was to confine these privileges to the cooperative associations of farmers who not only produce but prepare their production, like oranges, for the market. The Senate committee suggested an amendment to read:

'That the association shall not deal in products of nonmembers to an amount greater in value than such as are handled for it by members.'

That is in the Senate substitute."

(62 Cong. Rec. 2053.)

Senator McCumber:

"But the things which the Senator enumerated as things which might be contrary to the antitrust law are the very things which are being done and have been done for years by the California Fruit Growers' Association, and by certain dairy associations in the United States, and I have never known a time in which they have unduly enhanced the price of agricultural products."

(60 Cong. Rec. 313.)

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 66

CASE-SWAYNE CO., INC., *Petitioner,*

v.

SUNKIST GROWERS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR CASE-SWAYNE CO., INC.

Introductory

The only question presented by the writ of certiorari is whether Sunkist is a duly organized cooperative [1] notwithstanding that approximately 15% of its members are not producers of agricultural products, not cooperatives but profit-making corporations. Petitioner premised this question on the Capper-Volstead stipulation providing as to Sunkist's citrus packing-house members denominated "Agency Associations" that: "The agency association is *normally a private corporation.*" "Agency associations do not qualify as . . . cooperative associations under Section 1

[1] As used in this brief the word "cooperative" refers to an association duly organized under Section 1 of the Capper-Volstead Act.

of the Capper-Volstead Act." They are not fruit growers. They purchase the fruit they market through Sunkist from growers. "A contract between such an agency association and its growers which may be deemed as typical of such associations is attached hereto [the Capper-Volstead stipulation] as Exhibit 'B'." *"Agency associations constitute 14.91% by number, and 12.94% by volume of all associations in the Sunkist system."* (Our emphasis) R. 35-36 (para. 4, Agency Associations) (R. 41.)

Reply to Sunkist's Contention that Membership in Sunkist has no Legal or Economic Significance

(This contention is promiscuous throughout Sunkist's Brief. See for example pages 3, 15, 41, 46, 47, 48, 49, 55.)

I

The "non-growers" membership in Sunkist has more significance than the mere fact these members "have been issued membership certificates" (Sunkist Argument, p. 55).

The membership provisions of Sunkist make no distinction between packing houses that are cooperatives and the agency associations (a non-grower and "normally a private corporation"). (R. 35) As is pointed out, p. 6, Petitioner's Brief, Sunkist's Amended Articles of Incorporation and By-Laws refers to *all* Sunkist's packing-house members collectively as "local associations" (Article 2.2, R. 131). Even though the so-called "agency associations" (the ones we are here concerned with) are *not* fruit growers, *not* cooperatives but "is normally a private corporation" (R. 35).

In short *all* the packing-house members (whether composed of growers or non-growers) are *treated alike.*

The packing houses comprise Sunkist's most important class of membership. The District Exchange membership (Sunkist's only other membership class) is *representative*

only. It represents the packing houses affiliated with it. (Article 2.2, R. 131) As is provided in the Capper-Volstead stipulation:

> "Each District Exchange is organized and operated to meet the peculiar local needs of its member packing-house associations.
>
> * * * * * * *
>
> "Apart from its specialized marketing function, the District Exchange *is one of the conduits of communication and representation between the local packing house association and* Sunkist." (R. 42-43) (Our emphasis)

It would hardly seem to need mentioning that the members of an association (corporate or otherwise) *control* the association—its management—its business conduct (*as to whether such conduct shall be predatory or benevolent*).

Only the packing-house members have "property rights and interests" in Sunkist. (Subdivision 2 of Article Eight, "Property Rights", R. 126-127). They (the packing houses) exercise *exclusively* all membership voting privileges (except the election of directors *which they control* indirectly through the District Exchanges with which they are affiliated). (Articles 3.1; 3.3, R. 133, 135). The number of votes of the packing houses is determined by the volume of fruit they market through Sunkist (Subdiv. 1, Article Eight, "Voting Power", R. 126; Article 1.2(g), R. 129; Article 3.1, R. 133). Such exclusive packing-house voting privilege includes "varietal voting" relating to "promotion of a particular variety of fruit and the assessment relating thereto" (Article 3.2, R. 134). The number of directors also is related to the volume of fruit marketed by the packing houses in their District Exchange (Articles 5.1, 5.2, R. 137-138).

Membership of approximately 15% (comprising approximately 13% of Sunkist's volume) is hardly "negligible" (Sunkist's Brief, p. 41) or *de-minimus* (a trifle—a few dollars more or less [2]). For example, 12.94% of the dollar value of *oranges alone* controlled by Sunkist in the year 1957-58 amounts to *over $15 million* and the same percent of Sunkist's total sales for that year amounts to over $23 million.[3]

Thus, Sunkist, by admitting these non-growers to membership, very appreciably strengthened its monopoly control of oranges in the relevant market and its power to wrongfully exercise monopoly power and attempt to monopolize in violation of the Sherman Act.

II

The outstanding legal and economic significance in providing that a cooperative's members must be *"farmers"* is that Section 1 of the Capper-Volstead Act permits members to act together in a cooperative and fix the prices of their products, *which price fixing would otherwise constitute a per se violation of the antitrust laws.* That is why Congress exercised such care in choosing the language of Section 1 so that only actual farmers may constitute a cooperative's membership, *not* the *middleman,* such as flour mills, packers, packing houses—*for if 15% of a coopera-*

---

[2] See *National Labor Relations Board* v. *Fainblatt,* 306 U.S. 601, 607 (1939); *National Labor Relations Board* v. *Cowell Portland Cement Co.,* 108 F. 2d 198, 201 (9th Cir. 1939); *Fallbrook Public Utility Dist.* v. *Cowan,* 131 F. 2d 513, 516 (9th Cir. 1942), *cert. denied,* 320 U.S. 735 (1943); *McKeown* v. *Southern California Freight Forwarders,* 52 F. Supp. 331 (S.D. Cal. 1943), aff'd 148 F. 2d 890, *cert. denied,* 326 U.S. 736 (1945); *Los Angeles Meat & Provision Drivers Union* v. *United States,* 371 U.S. 94 (1962).

[3] Computed from figures on p. 17, "Petition For A Writ of Certiorari", No. 1157, October Term, 1966.

tive's members may be non-growers; why not 50%-100%? See discussion following.

Reply to Sunkist's Contention that Congress Intended that "Non-Farmers" could be members of Cooperatives

(Sunkist's Brief, pp. 44, 45, 35)

I

Congress was most cautious, most careful in employing language that would permit *only* "persons engaged in the production of agricultural products *as farmers* . . . or *fruit growers,*" to comprise a cooperative's membership. This is illustrated by the colloquy between Senators Cummins, Kellogg and Townsend quoted at pages 9-10, Petitioner's Brief. Congress deliberately chose language that would preclude *the middleman,* such as "flouring mills" and "packers" who "are engaged, in a broad sense, in the production of an agricultural product" from cooperative membership. (62 Cong. Rec. 2052). *If* (as Sunkist contends) such "non-growers" may act together in cooperatives, then *flouring mills* and *packers* of fruits and vegetables (although "normally private corporations") may "act together in associations" and fix the prices of *their* products. Then *packing houses* (although "normally private corporations") may "act together in associations" and fix *their* prices for picking, washing, grading and packing citrus fruit whether under a fruit purchase agreement or otherwise.

A holding by this court that such "non-growers" may fix prices by the device of a cooperative would open wide the door to price fixing to a huge segment of our economy.

In defending the membership of the so-called "agency associations" in the Sunkist association, Sunkist argues at great length that Exh. B to the Capper-Volstead stipulation (the typical contract under which the packing houses acquire their fruit from growers) is not a sale of fruit by the grower to the packing house although the contract specifically provides for the "sale . . . of the citrus fruit by the grower." And that the net proceeds are "the full purchase price for the fruit." (R. 70, 71) In support of this contention, Sunkist quotes and requotes it (pp. 11, 12, 40, 53) the preamble to that portion of the Capper-Volstead stipulation providing that Exh. B is the typical agreement between these Sunkist members and the growers. We quote the *preamble* together with the stipulation re. Exh. B.

> "The Agency Association does not itself participate in either the gain or loss involved in marketing fruit through Sunkist *beyond the recovery of its costs and fixed fee for packing.* Such Agency Association furnishes its facilities and services on an independent contract basis, wholly unrelated to the net returns from the sale of the product handled. *A contract between such an Agency Association and its growers which may be deemed as typical of such Associations is attached* hereto as Exhibit 'B'." (R. 36) (Our emphasis)

The preamble is but one way of saying that these packing-house members will not "gamble" on price fluctuations of fruit but *assure* their *profits.*

It is idle to argue as to just when title to the fruit passes from the grower. Title obviously passes at *some point.* The relevant, pertinent fact is *only*: These Sunkist members are *not* "engaged in the production of agricultural products as farmers . . . or fruit growers" and therefore do *not* "market" through Sunkist "such products of per-

sons so engaged." They acquire the fruit they market through Sunkist by a contract, of which "Exhibit B" to the Capper-Volstead stipulation is "typical."

Sunkist also argues that a cooperative could legally enter into such a contract (Exh. B) with packing houses. *Such argument is entirely beside the point.* A cooperative obviously may be entitled to enter into many types of contracts with various types of non-growers *Packers, packing houses,* "the butcher, the baker, the candlestick maker." The *only* issue the writ of certiorari is concerned with is: *Who may comprise the membership of a cooperative—not* who may a cooperative contract with.

Reply to Sunkist's Contention that the Issue Presented by the Writ of Certiorari was Determined in Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., 370 U.S. 19 (1962).

(See Sunkist's brief, pp. 36, 37, 48, 52, 53, 55).

I

On pp. 14-19, Petitioner's Brief we challenge the correctness of the majority decision of the Court of Appeals that the Capper-Volstead issue was decided by this court in the *Winckler* case. (Sunkist appears now to admit that its representations in the *Winckler* case that *all* the packing houses were "local associations" (Petitioner's Brief, pp. 18-19) was *incorrect* (Sunkist's Brief, p. 25).) Thus, we discuss only Sunkist's attempt to draw an analogy between what this court held of "*de-minimus*" effect in the *Winckler* case and the issue presented by the writ in this case.

The organizational distinctions that the Supreme Court in the *Winckler* case held of "*de-minimus* meaning and effect" to growers were these: The growers "through"

the same grower "local associations" organized *two* associations, i.e., Sunkist and Exchange Lemon[4] to do their processing and marketing. When they could have organized "*one* organization" (Court's emphasis) to perform these functions (370 U.S. at pp. 27-29). *Winckler* had *conceded that Sunkist Exchange Orange and Exchange Lemon were duly organized* under Section 1 of the Capper-Volstead Act. Thus, as stated by the dissenting judge of the Court of Appeals:

> "The *particular issue* [the issue presented by the writ herein] *was not presented to the Supreme Court, and it was not adjudicated.*" (R. 185) (Our emphasis)

The Legislative History of such Acts as the Agricultural Marketing Act (7 U.S.C. 451, et seq.), the Sherman Act, the Farmer-Labor Exemption In Appropriation Acts and the story of the California Associated Raisin Company (Sunkist's Brief, pp. 16-19, 23-25) are Irrelevant and Illusive as to Congress' Intent as to What Persons could qualify for Membership in Cooperatives under Section 1 of the Capper-Volstead Act.

I

On pages 9-14, Petitioner's Brief, we quote from the legislative history of the Capper-Volstead Act. We submit that this history conclusively demonstrates it was the intent of Congress that under the provisions of Section 1: *Only* actual "*farmers*" or "*growers*" should comprise a cooperative's membership.

---

[4] Exchange Orange was a 100% owned subsidiary of Sunkist.

We submit: The provisions of Section 1 of the Capper-Volstead Act relied upon by Petitioner mean what they say. And (as was the opinion of the dissenting judge of the Court of Appeals) apply to *all* associations—even Sunkist.

Respectfully submitted,

WILLIAM H. HENDERSON,
W. GLENN HARMON,
by William H. Henderson.

J. EDWARD JOHNSON,
RICHARD A. PERKINS.

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IN THE

Supreme Court of the United States

October Term, 1967
No. 66

CASE-SWAYNE CO., INC.,
Petitioner,

vs.

SUNKIST GROWERS, INC.,
Respondent.

PETITION FOR REHEARING BY RESPONDENT SUNKIST GROWERS, INC.

CHARLES E. BEARDSLEY,
SETH M. HUFSTEDLER,
DONALD D. STARK,
458 South Spring Street,
Suite 940,
Los Angeles, Calif. 90013,
Attorneys for Respondent Sunkist Growers, Inc.

DALE V. CUNNINGHAM,
P.O. Box 2706 Terminal Annex,
Los Angeles, California,
Of Counsel.

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IN THE

Supreme Court of the United States

October Term, 1967
No. 66

CASE-SWAYNE CO., INC.,

Petitioner,

vs.

SUNKIST GROWERS, INC.,

Respondent.

PETITION FOR REHEARING BY RESPONDENT SUNKIST GROWERS, INC.

Sunkist Growers, Inc. hereby petitions the Court for a rehearing of the above-entitled matter, the opinion in which was delivered on December 18, 1967, upon the following grounds and for the reasons hereinafter stated:

1. The Court has not correctly stated the facts in three important particulars.

2. Five key "findings of fact" made by this Court and material to the determination are not supported by the record herein.

3. The opinion confuses rather than clarifies the law of agricultural cooperatives in several important respects.

Summary of Sunkist's Position.

The Opinion of this Court delivered in this proceeding will have far reaching consequences for the thousands of Sunkist growers and for large numbers of agricultural cooperatives across the country. There is no question that it will limit the operation of cooperatives and discourage their development. It represents a major change of attitude and approach to cooperatives, advising farmers and growers that they must conform to the *form* as well as the *substance* of statutes relating to cooperatives.

The direct command of this decision to agricultural marketing associations is as follows: You must reach a specific result by a route which you must select at your peril, and after you have selected the route and made business commitments based upon it, we will then tell you whether the route is a correct one or not.

Such a major innovation should be based only upon a complete record which supports it. Such is not the case here.

This problem is caused principally because the Stipulation of Facts on which this proceeding is based was drafted to state the facts to show and meet Case-Swayne's assertion that Sunkist was not qualified under Capper-Volstead for two different reasons, neither of which is now asserted by Case-Swayne or considered by this Court.

The present ground, that *membership* of agency associations causes a loss of the Capper-Volstead qualification, was not asserted when the Stipulation was drafted. The Stipulation does not show such membership.

The Court has erroneously construed the arguments of the parties as a concession that the agency associations were members before October 31, 1958. They were not.

Therefore, a determination that Sunkist was not qualified before that date must be sustained on some other ground. But no other ground was presented in the petition for writ of certiorari and is therefore outside the scope of this proceeding. (Rule 23.)

The Court has not correctly stated the facts in three material particulars:

(1) The agency associations were not members of Sunkist before October 31, 1968;

(2) The agency associations do not have proprietary interests in their own right; and

(3) The agency associations do not receive a part of the anticipated return from cooperative marketing in Sunkist.

In addition, the Court has considered certain factual issues, and reached conclusions regarding them which are not supported by the record. Those issues are as follows:

1. *Is the benefit of collective marketing given to nonproducers, i.e., agency associations?* The parties *attempted* to *stipulate* that it is not, but the Court has apparently refused to accept that stipulation. It is grossly unfair to Sunkist to make a finding of fact contrary to what the parties—at least Sunkist—thought they were stipulating.

2. *Was or is Sunkist Organized or Controlled by nonproducers?* Clearly the record will not support a finding that nonproducers organized or controlled Sun-

kist. The Opinion implies that the Court feels to the contrary.

3. *Do the agency associations have a proprietary interest in Sunkist?* The Court says they do. This is based on a misconception of the revolving fund, and is in error.

4. *Does the contract between the agency association and Sunkist constitute an unreasonable restraint of trade?* The Court indicates that this is an important issue, but makes no attempt to evaluate it. The record does not include adequate facts to determine it. And yet the Court apparently *assumes* that such contracts may be an unreasonable restraint of trade.

5. *Is the agency association a bona fide agent of its growers?* Clearly growers could participate directly in Sunkist, and apparently also through bona fide agents. The Court here refuses to consider the agency associations as agents for its growers. If that refusal is based on fears that the agency associations are acting for themselves, and not their growers, the subject is not treated in the stipulation—nor the opinion, for that matter.

The record is not adequate to reach those determinations, and Sunkist should not be held to the severe standard laid down without an appropriate opportunity to be heard on these issues.

Finally Sunkist believes that the law of agricultural cooperatives is confused rather than clarified in several important respects.

I.

THE DETERMINATION BY THE COURT THAT SUNKIST WAS NOT QUALIFIED UNDER CAPPER-VOLSTEAD PRIOR TO OCTOBER 31, 1958 IS BASED ON AN ERRONEOUS STATEMENT OF FACT, AND INVOLVES DETERMINATIONS NOT WITHIN THE SCOPE OF THE QUESTION PRESENTED.

Case-Swayne[1] made a narrow, specific attack upon the Capper Volstead qualification of Sunkist: it was "whether the *membership* of a cooperative must be 'farmers' or (as pertinent to the instant case) 'fruit growers' or associations composed of fruit growers . . ." (Pet. p. 7; emphasis added.)

The attack made upon the Sunkist qualification in this Court in the briefs and argument of Case-Swayne has been a single, specific assertion; it was the *membership* of the agency association which was claimed to impair the exemption of Sunkist.

When this Court granted certiorari, it granted it on a specific question spelled out in the Petition: Did the fact that "15% of the association's *members* are not producers of agricultural products and not associations organized under said section . . ." cause the loss of the Capper-Volstead qualification? (Pet. p. 2; emphasis added.)

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[1]In order to avoid any confusion in designation of the parties, we will herein refer to the Petitioner for the Writ of Certiorari, Case-Swayne, as "Case-Swayne", and Sunkist Growers, Inc., the petitioner for rehearing, as "Sunkist."

This Court made it clear that it was the membership of the agency associations which was questioned. The Slip Opinion defines the issue as follows:

> "It is the *membership* of these agency associations in the Sunkist System that gives rise to the issue presented here." [Slip Opinion p. 3; emphasis added.]

Yet the facts are crystal clear, as hereinafter pointed out, that agency associations were not members of Sunkist Growers, Inc. prior to October 31, 1958.

The Court has avoided that problem, we submit inaccurately and unfairly, by observing in a footnote as follows:

> "Since the parties have agreed that [the 1958] changes in no way affect the issue here, we discuss Sunkist in its post-1958 form." [Footnote 4, Slip Opinion, pp. 3 and 4.]

The Court is, we believe, in error. The facts are as follows:

(1) Agency associations were not members prior to 1958.

(2) Sunkist has never agreed, stipulated, or assented to the proposition that the facts should be treated as though the agency associations were members prior to 1958.

(We have treated the examination of the record regarding these facts in more detail in Section III, A. following.)

Furthermore, since this Court has declared that Sunkist was not qualified prior to October 31, 1958, the Court obviously must have based that determination on

some ground other than the claimed membership of the agency associations in Sunkist. What is that basis? We submit that a careful examination of the Opinion makes it indeed quite difficult to isolate the criteria by which the Court determined that Sunkist was not qualified under the Capper-Volstead Act prior to October 31, 1958. (We have considered that subject in Section V, D following.)

Finally, such determination raises the critical question of whether or not the subject matter of the tests which might have invalidated the Sunkist System prior to October 31, 1958 were, indeed, included for review on this writ of certiorari. A fair reading of the question shows that it was limited to an examination of the consequences of having agency associations as "members." The use of some other basis for invalidating the Sunkist System, therefore, goes beyond the question which was stated for examination.

II.

THE BACKGROUND OF THE STIPULATION SHOWS THAT IT DOES NOT SUPPLY THE FACTUAL MATERIAL NEEDED TO DETERMINE ALL OF THE ISSUES THIS COURT BELIEVES ARE MATERIAL.

A. Many of the Grounds for Rehearing Are Due to Factual Deficiencies in the Record.

Sunkist has asserted, among other grounds for rehearing, that the Court has not correctly stated the facts in three important particulars, and that the record will not support certain other factual conclusions the Court has drawn.

These problems have arisen primarily because of the manner in which this matter comes to this Court. We

have therefore reviewed the history of the Stipulation, and the procedures relating to the Capper-Volstead defense to show how these deficiencies arose.

B. The Record Before This Court Is Limited.

There are three important and unusual limitations on the record in this case:

1. Although Case-Swayne demanded a jury, the Capper-Volstead defense was submitted to the court by stipulation, on stipulated facts.

2. The stipulation was drafted by the parties to present the facts each asserted on a challenge to Capper-Volstead qualification different from the one now asserted by Case-Swayne and decided by the Court.

3. At the trial below, the court directed a verdict for Sunkist at the conclusion of Case-Swayne's evidence. Sunkist did not put on its evidence, and therefore evidence introduced at the trial may not be considered herein unless admitted by Sunkist.

C. The Stipulation Itself Does Not Show the "Membership" of the Agency Associations.

By stipulation dated April 10, 1961, the parties submitted the question of the Capper-Volstead qualification to the District Court for determination. [R. 32, 45.]

In the stipulation, the parties declared that they had "entered into this Stipulation of Facts deemed by each to support its legal theory." [R. 33.] The stipulation dealt only with those facts regarding the organization of the Sunkist System prior to the merger of October 31, 1958, except that the stipulation did set out the fact of the merger of Sunkist Growers, Inc., Exchange

Orange Products Co. and Exchange Lemon Products Co. [R. 41.] The stipulation did not state that the agency associations were members of Sunkist, nor did it treat the organization of Sunkist with respect to membership after the 1958 merger.

The reason that the Stipulation did not cover the post-1958 situation was, of course, that the complaint did not cover it. The complaint was filed April 15, 1958 [R. 1] and covered the period from April 15, 1955 through April 15, 1958. [R. 7.]

The Supplemental Complaint was filed June 29, 1962 [R. 20] and covered the period from April 15, 1958 to January 31, 1962. [R. 24.]

By the time of the argument in the District Court regarding the Capper-Volstead qualification, March 2, 1964, the Complaint had been supplemented. The Parties simply stipulated that there had been no material change. [R. 26.]

The result is, therefore, that the parties stipulated that the facts were as they existed prior to the merger in 1958, except for the merger itself. The parties did not at any time stipulate with respect to the Articles of Incorporation or Bylaws of Sunkist following the merger, nor to the fact that agency associations had become "members" of Sunkist.

It is a fact, of course, that the Bylaws were amended to make the changes by which agency associations became members. The Articles of Incorporation as amended in 1958 and the new 1958 Bylaws were introduced in evidence at the trial. [R. 120 and 124.] Sunkist agrees that those are correct copies of such Articles and Bylaws and should be used at this proceeding, even though they were never formally incorporated into the stipulation.

After submitting the stipulation regarding the Capper-Volstead defense to the trial court, the trial court ruled on it in accordance with the parties' request. Thereafter, the case went to trial, and at the trial only Case-Swayne put on its evidence. Sunkist has not put on evidence on any subject in this proceeding other than the evidence which has been submitted in the Stipulation, and the evidence which came in on cross-examination of Case-Swayne's witnesses.

It should therefore be apparent that the only evidence before this Court is that stated in the Stipulaton, or as otherwise agreed to by the parties.

D. The Stipulation Herein Was Designed by Both Parties to Meet Challenges Other Than the One Now Sustained to the Capper-Volstead Exemption.

The present challenge by Case-Swayne is based solely on the "membership" of the agency associations in Sunkist Growers, Inc. (Pet. pp. 2, 7; Br. pp. 8, 21.) The Court's determination is apparently broader, although it also is based on the "membership" of the agency associations[2] and its conclusion that the parties are agreed that the facts were identical before and after 1958.[3]

Regarding the critical fact of membership, the Stipulation provided as follows:

> "Sunkist is a membership corporation whose members prior to October 31, 1958, were individuals

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[2]The Court defined the issue as follows: "It is the *membership* of these agency associations in the Sunkist System that gives rise to the issue presented here." [Slip Opinion, p. 3; emphasis added.]

[3]The Court noted, as observed above, "Since the parties have agreed that these changes in no way affect the issue, we discuss Sunkist in its post-1958 form." [Slip Opinion, footnote 4, pp. 3 and 4.]

appointed by and representing each of the District Exchanges, on the basis of one member for each District Exchange. Such individual members have normally been growers, but some have not been." [R. 36.]

The Stipulation did not state who were the members of Sunkist after October 31, 1958.

In its initial briefs submitted to the trial court, Case-Swayne did not challenge the qualification of Sunkist on the ground that the agency associations were members, nor, indeed, on the ground that agency associations participated in the Sunkist organization. The two specific challenges made to the Sunkist Capper-Volstead qualification were as follows:

(a) Sunkist's members were not fruit growers. "Sunkist members are individuals appointed by and representing each of the District Exchanges . . ." (Case-Swayne Op. Br. on Capper-Volstead issues, p. 7, lines 30-31 dated 5/29/61.)

(b) "Sunkist members do not meet the provisions of the Act requiring members to be natural persons and not corporations." (Case-Swayne Op. Br., Capper-Volstead Defense, p. 13, lines 5-6 dated 5/29/61.)

It was therefore for the purpose of litigating these two issues asserted by Case Swayne that the present Stipulation was drawn. The result is, therefore, that the Stipulation was not drawn by either party with the idea in mind of determining all of the facts which might arise on the basis of the issues the Court now finds determinative. Since this Court has indicated that other factual issues are, indeed, important to this determination, both parties should be given an opportunity to litigate all of those factual issues in the trial court below.

III.

THE COURT HAS NOT CORRECTLY STATED THE FACTS IN THREE IMPORTANT PARTICULARS.

A. Sunkist Has Not Agreed That the Agency Associations Were Members Before 1958.

The Court has observed that the parties have agreed that the 1958 changes in no way affect the issues here.[4] This observation is not correct. The one fact that this Court says is most critical—membership of agency associations—completely changed on October 31, 1958.

Sunkist does argue that the substantive relationship was the same before and after the 1958 merger, and that the agency associations were, in substance, not the "members" either before or after the changes. Sunkist has never agreed that the agency associations were "members" before 1958.

If the Sunkist argument has misled the Court into the belief that Sunkist consented to the proposition that agency associations should be treated as members prior to 1958, we express regret for the result, but believe it would be unfair to hold Sunkist to an agreement which factually did not occur and which is factually incorrect.

As we have pointed out in reviewing the history of the stipulation above, it simply states that the members

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[4]In Footnote 4, appearing on pages 3 and 4 of the Slip Opinion, the Court observes that in 1958 Sunkist altered its structure in two respects; first, local associations became members of Sunkist whereas before they had been represented through the District Exchanges, and second, the two wholly owned subsidiaries were merged into Sunkist. The Court then observes, "Since the parties have agreed that these changes in no way affect the issue here, we discuss Sunkist in its post-1958 form."

of Sunkist were "individuals appointed by and representing each of the District Exchanges . . ." [R. 36.] There is no further information on membership in Sunkist in the stipulation.

Thus the facts are clear that agency associations were not members of Sunkist before October 31, 1958. If the Sunkist System was not qualified under Capper-Volstead before that date, it must be for some other reason. Yet the *membership* of the agency association was the sole basis asserted by Case-Swayne, and the question on which certiorari was granted by this Court.

B. The Agency Associations Have No Proprietary Ownership in Sunkist, in Their Own Behalf.

This Court points out that the local associations, which include the agency associations, "have the proprietary ownership of Sunkist's assets." [Slip Opinion, p. 4.]

That statement is only a half-truth, and is substantively erroneous. All proprietary interests held by agency associations belong to the growers.

The property rights in Sunkist, are determined by the revolving fund. A deduction is made each year from the proceeds of sale, and retained by Sunkist to handle its capital requirements. As additional sales are made, the oldest of the revolving fund credits are repaid to the growers. [R. 126-127.] In addition, in the possible event of dissolution or liquidation, any remaining assets of Sunkist would be distributed in proportion to the revolving fund credits. [R. 127.]

Under the Sunkist Bylaws all proceeds of sales are returned to the persons entitled thereto on the basis of quantity or value of products furnished. [R. 150.] Under the Bylaws the person entitled thereto are in the first instance either the District Exchange or the local association, including the agency association.

However, the agency association is then obligated to return them to the grower. The typical contract between the grower and an agency association provides: "The company will render to the grower a statement showing the net amount due, and will thereupon pay to the grower the amount of said net proceeds . . .". [Ex. B to Stipulation, R. 71.] The net proceeds are defined by the immediately preceding paragraph as the proceeds received on the sale of the fruit less costs and the fixed charge for handling the fruit. [R. 71.] Since the revolving fund credits are part of the net proceeds, they must be returned to the grower.

This end result is expressly confirmed by the Bylaws of Sunkist which provide as follows:

> "The primary purpose for which Sunkist is formed is to furnish facilities and agencies through which the citrus fruit of its members and other producers may be marketed or processed and marketed, and to return to said members or other producers the proceeds of sales, less necessary operating and marketing expenses, on the basis of the quantity or value of citrus fruits marketed for such member or other producer." [R. 124.]

Thus, to say that the agency associations have a part of the proprietary interest in Sunkist is erroneous. Only to the extent that the revolving fund credits are

created by the agency association as an actual grower [some are and some are not growers; R. 35], does the proprietary interest vest in the agency association.

Under almost identical language in the series of agreements setting up the Walnut Growers Association, the California courts have determined that that kind of provision required the distribution of reserve funds retained by the central cooperative to the ultimate producer. See *Bogardus v. Santa Ana Walnut Growers Ass'n.*, 41 Cal. App. 2d 939 (1940).

C. The Agency Associations Do Not Receive a Part of the Anticipated Return From Cooperative Marketing in Sunkist.

One of the principal concerns in this Opinion is whether or not the agency associations receive the benefits of cooperative marketing. The Court has concluded that the agency association may receive such benefit. It stated as follows:

> "It may well be that the fixed fee is dependent on the benefits of collective marketing through Sunkist, in the limited sense that it represents to the parties what one can charge and the other can pay, both anticipating the return the grower may achieve through pooling his fruit with the Sunkist organization." [Slip Opinion, p. 6, Footnote 5.]

The Court thus assumes that the agency association may furnish its facilities on some basis which is tied to or influenced by the net returns from the sale of the product handled. The parties have stipulated directly to the contrary:

> "Such agency association furnishes its facilities and services on an independent contract basis,

wholly unrelated to the net returns from the sale of the product handled." [R. 36; emphasis added.]

The Court has thus refused to accept the stipulated fact of the parties, and has not given the parties an alternate opportunity to introduce evidence on the subject.

IV.

SEVERAL KEY "FINDINGS" OF THIS COURT ARE NOT SUPPORTED BY THE RECORD.

There are a number of key facts, some relatively simple, some quite complex, which have been stated by this Court in this proceeding. In the instance of each of the following factual determinations, the present record is not adequate to support or require such determination.

(a) Finding No. 1: The Agency Association Receives the Benefit of Cooperative Marketing Through the Sunkist System.

As Sunkist views the Opinion of the Court, the Court agreed with Case-Swayne that the test of qualification under the Capper-Volstead Act was whether or not the benefits of collective marketing were limited to actual producers. The House Report is quoted as follows:

> "These limitations are aimed to exclude from the benefits of this legislation all but *actual farmers* and all associations not operated for the mutual help of their members *as such producers.*" [Slip Opinion, p. 7; emphasis by the Court.]

The Court also notes that various other passages of the legislative history of the Act support the determina-

tion that "it was intended that only actual producers of agricultural products be covered by the legislation. . . ." [Slip Opinion, p. 8.]

The Court thus seems to conclude that Sunkist runs afoul of the limitations of the Capper-Volstead Act because benefits are given to agency associations. Yet such finding runs directly contrary to what the parties obviously attempted to state in the stipulation before this Court. The parties expressly stipulate as follows:

> "The packing house facilities of the Agency Association are made available to the producers on the basis of the fruit being packed for marketing at cost plus a fixed fee. The Agency Association does not itself participate in either the gain or loss involved in marketing fruit through Sunkist beyond the recovery of its costs and a fixed fee for packing. Such Agency Association furnishes its facilities and services on an independent contract basis, wholly unrelated to the net returns from the sale of the product handled." [R. 35-36.]

The concern of the Court over the factual accuracy of the stipulated fact was repeated by numerous questions from the Court which required a substantial part of the time at oral argument. The concern of the Court over the fairness of the contracts with agency associations for fixed fees was also illustrated during the oral argument, and is expressed in Footnote 5 on page 6 of the Slip Opinion.

The essence of the Court's decision, however, is that the agency association does receive the benefit of cooperative marketing, which is directly contrary to the spirit and intention of the stipulated facts before the Court.

The speculation by the Court in Footnote 5 that the charge of the agency association may be affected by the anticipated return is flatly contrary to the Stipulation that the agency association "furnishes its facilities and services on . . . [a] basis wholly unrelated to the net returns from the sale of the product handled." [R. 36.]

The parties were trying to stipulate that the agency association did not receive the economic benefits of collective marketing. They certainly were not stipulating to the contrary. Yet this Court has found to the contrary.

If the Court believes the stipulation is inaccurate, or is unwilling to accept it for any other reason, the parties should be given an opportunity to develop the factual information for the Court. But it is unfair to charge Sunkist with a "fact" where the parties were attempting to stipulate to the contrary.

(b) Finding No. 2: The Agency Association Has, to Some Extent, "Organized and Controlled the Sunkist Organization."

A second fact necessarily found by this Court is that the agency association to some extent has organized and controlled the Sunkist System. The Court points out that certain language in the statute "was designed to insure that qualifying organizations be truly organized and controlled by, and for, producers." The result of this Opinion is to say that Sunkist does not qualify because it is either "organized" or "controlled" by agency associations.

No portion of the Stipulation was specifically pointed toward the organization of Sunkist, except that the his-

tory of the System set out in paragraph 9 of the Stipulation shows it was the "growers" who initially built the organization. [R. 37-43, 38.] Nothing in the record would support the assertion that the System was organized by agency associations or any nonproducer.

The Court was greatly concerned with "control" of the Sunkist System. Clearly the record would not support a conclusion that Sunkist is controlled by nonproducers. All it would support is a determination that the growers contract with and designate agency associations, and that the associations participate on a representative basis in the eventual selection of the Sunkist board of directors, and vote on certain varietal matters.

If this decision turns on an element of *factual control* by nongrowers, or on a question of whether nongrowers are acting from an element of personal gain this stipulation does not cover these facts.

Until this Opinion was issued, no one, including Case-Swayne, had asserted that Sunkist was "organized" or "controlled" by nongrowers. If this now is a material issue, it should be fully developed, and not determined on information submitted to resolve other factual problems.

(c) Finding No. 3: The Agency Association Has a Proprietary Interest in Sunkist.

This Court stated that the local associations, which include the agency associations, "have a proprietary ownership of Sunkist's assets." [Slip Opinion, p. 4.] The statement is inaccurate.

We have explored this point in more detail, under point III B above, and shown that under the typical

agreement between the agency association and the grower, the agency association is obligated to return to the grower all of the proceeds of the sale of the fruit, which includes all of those interests which have been called "proprietary ownership" of Sunkist's assets under its Bylaws.

As a result, the Court's observation that the agency associations own proprietary interests in Sunkist is in error. The revolving funds, which represent the capital requirements and net worth of Sunkist must ultimately be returned to the grower who produced the fruit which created the credits in the revolving fund.

(d) Finding No. 4: The Contracts Between Sunkist and the Agency Association (May) Constitute an Unreasonable Restraint of Trade.

A most critical area where the Court has reached at least a tenative conclusion has to do with whether or not the arrangements between Sunkist Growers and agency associations constitute an unreasonable restraint of trade.

The Court observes [Slip Opinion, p. 11] that Sunkist made the argument that the membership of agency associations had no economic significance because the fruit of the agency associations could be handled as nonmember fruit. The Court then declares:

> "But this Court has held that the antitrust implications of the relationship between a cooperative association and others is governed by entirely different standards. 'The rights of . . . agricultural producers thus to unite [under the Act] . . . cannot be deemed to authorize any combination or conspiracy with other persons in restraint of trade that these producers may see fit to devise.' [Citing *United States v. Borden Co.*]"

The meaning of this passage is highly obscure and confuses an important area of the law, as is hereinafter pointed out. (Sec. V, C.) We are not dealing here with "any conspiracy . . . in restraint of trade that these producers may see fit to devise." We have not asked for a blank check on any kind of dealings with nonexempt entities. We are dealing here with a specific kind of plan used by Sunkist for over forty years and not heretofore challenged.

Is this Court declaring that, *whatever may be the effect of Sunkist dealings with agency associations,* all such dealings constitute an unreasonable restraint of trade?

If the Court is, then it has made a finding of fact that this is an unreasonable restraint. No facts in the record are devoted to this question, nor does this Court give any consideration to the evaluation of such question.

On the other hand, if this Court makes no such finding, then such agreements may be proper; the fruit could then be handled by Sunkist as nonmember fruit, and the fact that the fruit is handled through agency associations has no economic significance.

Of course, the citing of the oblique reference to this problem in the *Borden* quotation leaves the parties guessing as to what the Court means.

The conclusion remains, however: the facts were not submitted to this Court to evaluate whether or not such contracts constitute a restraint of trade; the parties did not brief or argue the point; and the opinion of the Court shows no evaluation of the point.

(e) Finding No. 5: The Agency Association Is Not a Bona Fide Agent for Its Growers.

The principal argument by Sunkist is and has been that there is no economic significance to "membership", but that the same effective economic result can be reached in other ways. When that argument is described in the Opinion, the only possible method of accomplishing that result considered by the Court was treating the agency association fruit as nonmember fruit. [Slip Opinion, p. 11.]

That description, of course, does not fairly characterize the Sunkist argument regarding economic significance. (Sunkist Br., pp. 47-51.) That argument had two bases: the same result could be reached either by showing that "the agency association serves the same economic and cooperative purpose for its growers as the cooperative association does for its growers" (Sunkist Br. p. 49), or that the "agency association is, in fact, an agent for its growers in marketing the growers' fruit". (Sunkist Br. p. 51.)

The argument was stated as follows on pages 49 and 50:

> "The only effective economic difference between the use of a cooperative association and the use of an agency association is that the grower or growers who do not wish to put up the initial capital to create and maintain a plant for processing oranges for delivery may contract with an agency association to supply that service and those facilities and to act as marketing agent through Sunkist.
>
> "If a farmer doesn't have the capital to help to build a plant, or if he believes he can contract for

> a plant more cheaply than building one, he should be permitted to do so. Congress wanted particularly to help the impecunious farmer, and to encourage efficiency in handling the product."

Neither the present Opinion of the Court nor Case-Swayne, challenges the proposition that if the growers had participated directly, or had dealt through cooperative associations, the Capper-Volstead exemption would have been secured. Nor does either challenge the proposition that growers may employ appropriate agents to handle their business, either the physical processing or the marketing of the fruit.

For example, cooperative associations can certainly hire labor to handle the fruit and to process it. They may certainly hire salesmen to attempt to sell their fruit; and undoubtedly they can hire a general manager and appropriate executive officers to assist in making the important decisions of marketing. Could they not, therefore, employ the agency associations, as they have sought to do, to handle the processing of the fruit and assist in the marketing of the fruit?

If there is a vice to the "agency arrangement" it can only be that either the agency is not a bona fide agency, or that it amounts to an unreasonable restraint of trade. There has been no claim by Case-Swayne that either of these situations is true, and therefore no attempt by Sunkist to set out the necessary factual information which would show that these claims are untrue. Yet this Court has reached one or the other of those conclusions without any support in the record. If these matters are material to the Court's decision, as the Opinion indicates, the parties should now be given a full

opportunity to develop the factual information regarding them.

It should be noted that it is not necessary to lay down the severe rule which is declared by this Court in order to prevent the spectre of having control of Sunkist residing in the hands of agency associations. As in so many other matters affecting antitrust laws, the question should be one of fact in each case: Is the agency a bona fide relationship, carried out for the benefit of the grower? Does the grower, in fact, control the association? Is the association being used for some ulterior purpose? More specifically, is the association being used for the private purposes of the agency association? These are factual questions which can be litigated and resolved in any case. There has been no reason to supply the Court with this factual information in this case, because, to this point, no one has challenged the good faith of the Sunkist operation.

V.

THE PRESENT OPINION CONFUSES RATHER THAN CLARIFIES THE LAW OF AGRICULTURAL CO-OPERATIVES IN SEVERAL VITAL AREAS.

A. The Court's Holding That the Capper-Volstead Act Is to Be Strictly Construed Against Agricultural Cooperatives Represents a Radical Change in the Construction of These Remedial Statutes, and Is Contrary to the Expressed Intention of Congress.

Congress has on many occasions expressed its intention to favor the formation of agricultural cooperatives and to be liberal in the method in which such organization is permitted.

See, *e.g.* 12 U.S.C. § 1141;
7 U.S.C. § 455.

The House Committee Report on the Capper-Volstead Act made the intention of Congress entirely clear:

> "The aim has been to make the provisions of the Bill sufficiently liberal so that all cooperative farm associations operated in good faith for the benefit of their members might avail themselves of the provisions of this Bill."
>
> (H. R. Rep. No. 24, 67th Cong., 2d Sess. (1921).)

The Courts have reached the same conclusion. This Court has said that it is the "economic significance" which is important, not "organizational distinctions of de minimis meaning. . . ."

> *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 29 (1962).

The Agricultural Marketing Act is "a remedial statute, entitled to liberal construction. . . ."

> *Interstate Commerce Comm. v. Jamestown Farm, U.F. Coop T.A.*, 151 F. 2d 403, 404 (8th Cir. 1945.)

Again referring to the Agricultural Marketing Act, the "Act was intended to encourage the organization and operation of farm cooperatives; its terms are to be liberally construed to effectuate that purpose."

> *Northwest Agricultural Cooperative Ass'n. v. Interstate Commerce Comm.*, 350 F. 2d 252, 257 (9th Cir., 1965).

For the first time, the Court has taken a position directly contrary to the expressed intention of Congress in liberally construing the statutes. The Court now applies the doctrine of *Allen Bradley Co. v. Local No.*

3, 325 U.S. 797, 809 (1945) and states that we are now dealing with special exceptions to a general legislative plan. What effect is this to have on the numerous decisions which have preceded, under the warm light of liberal construction? Are these cases now impliedly overruled?

This decision now declares that agricultural cooperatives must not only comply with the substantive requirements of these statutes but must fit into a precise legal format to reach the objective.

B. The Present Opinion Creates Doubt Regarding the Potential Liability of a Federated Cooperative, and in Particular the Potential Scope of Liability of Sunkist in This Particular Case.

The Court here limited the determination to a narrow point: "All we decide is that Sunkist Growers, Inc. is not entitled to assert Capper-Volstead as a defense to the suit based on §1 of the Sherman Act." [Footnote 15, Slip Opinion, p. 12.]

We thus start with the proposition that Sunkist Growers, Inc., is not an exempt organization and that the agency associations are not exempt organizations. However, there are many cooperatives within the Sunkist System which, as individual units, undoubtedly are qualified as Capper-Volstead cooperatives. Furthermore, there are many growers dealing directly with their own products or with the exempt cooperatives whose conduct undoubtedly is covered by the Capper-Volstead Act.

The court's decision creates a complex of difficult problems which not only must be faced by the trial court in this case on retrial but by agricultural cooperatives

generally. Where an exempt cooperative has dealings with non-exempt organizations, does the exempt cooperative risk its qualification under Capper-Volstead? Or is the sole test simply whether or not the dealings between the cooperative and the non-exempt entity constitute a reasonable exercise of business judgment, or whether they may constitute an unreasonable restraint of trade?

We would assume, for example, that dealings between the parts of the Sunkist System which are qualified are still exempt; that dealings between those exempt cooperatives and individual growers are still exempt. We would assume that the exempt cooperative might employ Sunkist as its marketing agent, so long as such employment was on a reasonable basis. We would further assume that growers may employ agency associations as marketing agents, so long as the arrangements are reasonable. Furthermore, it would follow that dealings between Sunkist and the agency associations would not subject Sunkist to liability so long as they were reasonable, and the "agents" were acting as marketing agencies in common for growers or cooperative associations.

Conversely, then the area of potential liability would appear to be the area in which the dealings of any of the parts of the Sunkist System with agency associations constitute an unreasonable restraint of trade.

This is, of course, precisely the rule which Mr. Justice White would lay down in his concurring opinion. He pointed out that "Case-Swayne should not recover for injury to its business caused by other intercooperative or intergrower transactions and not resulting from the forbidden relationship between an exempt and a

nonexempt entity." [Concurring Opinion, Justice White, p. 4.]

The Court's opinion does not say how this issue should be resolved. On retrial, therefore, the trial court must make a determination on this issue in deciding what evidence will be admitted and how it will instruct the jury. In the absence of clarification by this Court, Sunkist will take the position in the trial court that the rule hereinabove stated by Justice White is the correct one, and that the Opinion of the Court has not expressed an opinion on that subject.

In addition, to the extent that plaintiff challenges any of the conduct of Sunkist in this case, Sunkist will assert, on retrial, that such conduct is not an unreasonable restraint of trade in the light of the Sherman Act, the Clayton Act and the provisions of the common law.

But more important than the scope of the potential liability in the present case—as critical as that is to the interests of the citrus growers in Sunkist—the present Opinion now leaves in doubt the extent to which federated cooperatives or any cooperatives may employ others to act for them, either in processing, or as marketing agents, separately or in common.

C. The Comments of the Court Regarding Nonmember Fruit Are Ambiguous, and Will Cause Great Confusion and Difficulty of Application.

For the first time, this Court has interpreted the nonmember fruit clause of the Capper-Volstead Act. The Act, of course, provides for joint action in cooperative marketing of fruit, provided that "the Association shall not deal in the products of nonmembers to

an amount greater in value than such as are handled for it by members."

This clause has appeared to be a clear authorization to a cooperative to market nonmember fruit up to the amount of member fruit handled, without the risk of the assertion that such arrangement constituted a combination or conspiracy in restraint of trade, or that it created a monopoly. Unfortunately, the present opinion does not state any governing rules, but treats the subject obliquely so that the result is left in considerable doubt.

The treatment of this subject is presently introduced in the Opinion by the characterization of a Sunkist argument that "membership" of the agency association has no "economic significance", because the fruit could have been handled as nonmember fruit. There then follow the two vital sentences on this subject:

> "But this Court has held that the antitrust implications of the relationship between a cooperative association and others is governed by entirely different standards. 'The right of . . . agricultural producers thus to unite [under the Act] . . . cannot be deemed to authorize any combination or conspiracy with other persons in restraint of trade that those producers may see fit to devise." [Citing *United States v. Borden Co.*, 338 U.S. 188, and *Maryland and Virginia Milk Producers Ass'n. v. United States*, 362 U.S. 458.]

The fundamental question remains unanswered: Does the Capper-Volstead Act give any kind of approval to the handling of any nonmember fruit? Congress wanted specifically to improve the market position of the cooperatives; is the additional fruit which is

brought into the cooperative through nonmember contracts to be considered as any other ordinary business contract, and if it strengthens the cooperative's marketing position, is the cooperative running the risk of a claim of monopoly, attempted monopoly, or unreasonable restraint of trade?

Unfortunately this passage in the Opinion confuses what has been a settled and uniform practice among agricultural assocations for forty-five years following the adoption of the Capper-Volstead Act, in handling nonmember fruit.

D. The Basis for the Court's Determination Is so Unclear as to Leave Agricultural Cooperatives in Doubt of Their Position, and to Foster Needless, Expensive Litigation.

It is often difficult to extract from an opinion a single, clear cut statement of its determination. Here, we submit, there is no basis realistically stated to use as a future guide post. The only potential bases Sunkist can find in the Opinion, and its comments, are as follows:

(1) Agency Associations Cannot Be "Members" of Sunkist.

This was Case-Swayne's position. The Court apparently rejected that as the sole test, because the Court found no materiality to the fact that agency associations were not members before October 31, 1958.

(2) Agency Associations Have Property Rights in Sunkist.

If this principle is the basis of the decision, it must fall. The facts show that agency associations do not have property rights in Sunkist for their own account.

(3) Compensation Paid to Associations Gives Them the Benefit of Collective Marketing.

The Opinion indicates that this is the basis of the decision. Yet it is directly contrary to the parties' stipulation.

(4) The Relationship Between Agency Associations and Sunkist Increases Sunkist's Share of the Market.

The Court has concluded that in one respect the agency associations do have economic significance. This conclusion is based on the finding by this Court that the membership of agency associations in Sunkist directly increases Sunkist's market share. This finding is not supported by any fact in the record, and is directly contrary to what we believe is the most reasonable inference, namely, that growers market through Sunkist because of the benefits of cooperative marketing. In any event, changes in market share are not relevant to Capper-Volstead qualification.

This challenged finding follows the Court's statement that the 8% limitation on dividends in a stock corporation was designed to insure that the organization would be organized and controlled by and for producers. The Court then pointed out that even though these clauses recognized that nongrowers could participate in the capital structure, the provisions do not affect this case, because obtaining capital from nonproducers "does not directly enlarge the market share already possessed by the producers themselves. The participation in Sunkist of agency associations has precisely that effect." [Slip Opinion, p. 11.]

As we have said, this finding is not supported by the Stipulation of Facts. The Stipulation does point to

a number of facts which have led growers in the past to market through Sunkist. It does not say that the existence of agency packing houses was one of these facts. Sunkist believes that the existence of agency packing houses is a benefit to the growers who do not desire to have their capital tied up in a packinghouse; Sunkist does not believe, however, and there is nothing in the Stipulation which provides that significant numbers of growers are now marketing their fruit through the Sunkist system because of the membership of agency associations. In short, the Court's finding has necessarily been based upon assumed facts outside the record.

Furthermore, market share is irrelevant to Capper-Volstead qualification. When fruit, is marketed cooperatively, the cooperative's market share is increased without regard to the manner in which the fruit enters the system. Even if it is assumed that the market share of Sunkist is increased because fruit has been brought into the system through agency houses, this fact has no legal significance, because the same economic result could have been achieved by enrolling those producers who market through agency associations directly as members of Sunkist, or into other cooperative associations. *The Court is now relying solely on a matter of form:* the "economic importance" is ignored.

Furthermore, this Court has already laid down appropriate safeguards regarding the operation of Capper-Volstead cooperatives. If such cooperatives conspire with others to restrain trade unreasonably (*United States v. Borden*), or if they unreasonably restrain trade (*Maryland and Virginia Milk Producers Ass'n.*

v. United States) or, if they are guilty of monopolization (see *Sunkist Growers, Inc. v. Winckler & Smith Citrus Prod. Co.*) they will be responsible for the damages proximately caused.

But each of these cases recognizes that farmers may combine to market their products and increase their market influence by such combination.

Despite the Opinion adverse to Sunkist, we find no indication in it that the Court has refused to accept Sunkist's claim that the principal benefit of including growers in the Sunkist System through the agency associations was to return to those growers the same economic benefit that other Sunkist Growers obtain. Thus the observation of the relationship of market share to the Capper-Volstead qualification is particularly confusing, and does not justify the present decision.

(5) The Agency Associations Have Voting Rights in Sunkist.

More broadly stated, the Court has made it clear that nongrowers cannot "control" a Capper-Volstead cooperative. But the facts here do not show control by nongrowers, nor has any such control been asserted by anyone.

The Court has observed, however, that although District Exchanges have the voting rights with respect to the Board of Directors of Sunkist, local associations including agency associations have voting rights on all other matters. [Slip Opinion, p. 4.]

The Capper-Volstead Act specifically permits the growers to hire a marketing agent, and permits the marketing agent to act in common with other marketing agents. If a marketing agent may actually handle

the marketing of the product, can he not do that which is so much less? In other words, can he not simply participate in the selection of the governing body of the common marketing agent, so long as he is acting for the interests of his grower? Is there a prohibition against the grower's giving his proxy to his agent?

Should such participation be a *per se* termination of the Capper-Volstead exemption? Does the mere fact of such a vote cause the loss of the exemption, or shouldn't the general rule apply regarding dealings with outsiders: is the conduct reasonable under all of the circumstances? If, none the less, it is this element which causes the loss of exemption, should not the rule be so declared so that cooperatives generally may know that it is specifically the element of having a vote in the cooperative system which will require adjustment and reorganization of the cooperative structure?

Conclusion.

The decision in this matter will have far reaching effects on agricultural marketing—far more so than is readily apparent. Of course Sunkist alone acts on behalf of some 10,000 growers, who must ultimately bear the economic burden of this and other litigation which will be spawned by this decision, and any potential liabilities therefrom.

As certain as is the probability of a physical event, once appropriate forces are set in motion, is the reduction of cooperative marketing from this opinion. It can operate only in one direction: discouraging agricultural

producers from acting together, discouraging them from obtaining and using necessary processing and marketing facilities, and forcing withdrawal and dissolution to avoid situations now said to be of doubtful legality.

This opinion accomplishes two major revolutions in quiet words. Disposition of nonmember fruit, even though the economic benefits are returned to the growers on the same basis as to member-growers, is now suspect. Presumably the Capper-Volstead Act had authorized marketing of up to fifty percent nonmember fruit. Now every contract of every cooperative regarding nonmember fruit is suspect under this Opinion.

Second, all three branches of government have recognized the monumental problems of agriculture. All have cooperated to assist cooperative marketing by agricultural producers. The courts and Congress have expressly declared that the statutes should be liberally construed to this end.

The Supreme Court has now said that that day has passed. Statutes aiding cooperatives will be strictly construed. The cooperatives must not only meet the substantive requirements framed by Congress, but they must not follow, at their peril, an organizational blueprint dimly drawn by the Court, and not specifically required by Congress. Whether the formal defect resulted in actual misuse of abuse of the system is not material; whether it had economic impact on the growers, the public or competition is not the test. The only test is form: did the nongrower somehow participate. The

court will not pursue whether good or ill resulted, whether the arrangement was reasonable or unreasonable.

This severe result is not necessary to reach any rule or regulation of cooperatives. If the test is control of cooperatives, benefit from its operation, or whether there is an unreasonable restraint of trade, all of such tests should be governed by a factual test in the light of a rule of reason.

Respectfully submitted,

CHARLES E. BEARDSLEY,
SETH M. HUFSTEDLER,
DONALD D. STARK,
Attorneys for Respondent Sunkist Growers, Inc.

DALE V. CUNNINGHAM,
Of Counsel.

Certificate.

I hereby certify that this Petition for Rehearing is presented in good faith and not for the purpose of delay.

Dated: January 11, 1968.

SETH M. HUFSTEDLER

SUPREME COURT OF THE UNITED STATES

No. 66.—October Term, 1967.

Case-Swayne Company, Inc., Petitioner, *v.* Sunkist Growers, Inc. } On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[December 18, 1967.]

Mr. Justice Marshall delivered the opinion of the Court.

This is a treble damage action under § 4 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 15, for alleged violations of both § 1 and § 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. §§ 1, 2. The District Court granted a directed verdict, at the close of plaintiff's case, for the defendant Sunkist Growers, Inc. The Court of Appeals for the Ninth Circuit reversed as to that portion of the complaint predicated on § 2 of the Sherman Act, holding that sufficient evidence was presented that Sunkist monopolized or attempted to monopolize trade in the relevant market;[1] it affirmed as to the dismissal of the Sherman Act § 1 charge, holding that Sunkist qualified as a cooperative organization under the Capper-Volstead Act, 42 Stat. 388, 7 U. S. C. § 291,[2] and therefore could

[1] 369 F. 2d 449 (1966), cert. denied, 387 U. S. 932 (1967). See *Maryland & Virginia Milk Producers Assn.* v. *United States*, 362 U. S. 458 (1960); *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 370 U. S. 19 (1962).

[2] Section 1 of the Act reads:

"Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing

not be held for any intraorganizational conspiracy to restrain trade. In order to determine the scope of that exemption from the antitrust laws, we granted certiorari. 387 U. S. 903 (1967).

The issue is whether Sunkist is an association of "persons engaged in the production of agricultural products as . . . fruit growers" within the meaning of the Capper-Volstead Act, notwithstanding that certain of its members are not actually growers. We hold that it is not.

I.

The organizational structure of the Sunkist system is as follows. At the base are some 12,000 growers of citrus fruit in Arizona and California. The growers are organized into "local associations," as they are designated in Sunkist's bylaws, numbering approximately 160, each of which operates a packing house for the preparation of the fruit for market. The vast majority of these local associations—about 80% by number and 82% by volume of fruit marketed in the Sunkist system—are, it is stipulated, cooperative associations in which all members are fruit growers.[3] A few of the local associa-

agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: *Provided, however,* That such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:

"First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or,

"Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.

"And in any case to the following:

"Third. That the association shall not deal in the products of nonmembers to an amount greater in value than such as are handled by it for members."

[3] "Limitation of membership in the local associations to actual citrus-fruit producers is a cardinal principle of the Exchange [*i. e.,* Sunkist] system." Gardner & McKay, California Fruit Growers

tions—no more than 5% by number and volume of fruit—are corporate growers whose total volume is sufficient to justify installation of their own packing house facilities.

The remainder of the local associations (also designated as "agency associations")—about 15% by number handling about 13% of the fruit in the Sunkist system—are private corporations and partnerships, owning and operating packing houses for profit. Their relationship to the growers whose fruit they handle is defined not by a cooperative agreement but by a marketing contract, *i. e.*, these packing houses contract with each grower to handle his fruit for cost plus a fixed fee. It is the membership of these agency associations in the Sunkist system that gives rise to the issue presented here.

The local associations, including these private packing houses, are members of "district exchanges," nonprofit membership corporations. The principal functions of the approximately three-score district exchanges are in the marketing of the fresh fruit of their member associations; they negotiate sales, arrange for shipment, and serve as conduits of communication between the local associations and Sunkist. Representatives of the district exchanges select the board of directors of Sunkist.

Sunkist itself, since 1958,[4] has two classes of "members": the district exchanges, whose principal member-

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Exchange System 88 (U. S. Dept. of Agriculture, FCA Cir. No. C–135 (1950)). See also Cumberland, Cooperative Marketing—Its Advantages as Exemplified in the California Fruit Growers Exchange 87 (1917). The corporate name of Sunkist prior to 1952 was the California Fruit Growers Exchange.

[4] In 1958, approximately the midpoint of the period relevant to this complaint, Sunkist altered its structure in two principal respects: first, local associations became members of Sunkist Growers directly, whereas under the old bylaws they had been represented

ship function is to select the board of directors, and the local associations, which vote on all other matters and which have the proprietary ownership of Sunkist's assets. The corporate entity Sunkist Growers, Inc., owns the trade name "Sunkist" under which the fruit of its members is marketed. It has an extensive sales organization; employs marketing and traffic specialists; and performs many other services for its members through, for example, its research facilities.

More particularly, Sunkist owns processing facilities for what is known as "product" fruit, *i. e.*, fruit that for various reasons is not sold in the fresh fruit market, but rather is used for processed fruit products such as canned or concentrated juices.

Sunkist controls approximately 70% of the oranges grown in California and Arizona, and approximately 67% of the product oranges. This control is manifested through various contractual agreements. For example, each grower in the cooperative local associations agrees that he will market all of his fruit through his association. Each grower who contracts with an agency association packing house appoints it as the marketing agent for all of his fruit. That agreement is generally for five shipping seasons, although it may be canceled at any time "by mutual consent" or on written notice by the grower during August of any year in which it is in force. An escape clause permits the grower to sell such fruit as may be "mutually agreed upon" between him and the packing house to others, if he can obtain a price higher, in the judgment of the packing house, than that which the grower would obtain through his agreement with it. Should the grower be so released from his agree-

through the district exchanges; second, two wholly owned corporate subsidiaries of Sunkist—Exchange Lemon Products Co. and Exchange Orange Products Co.—were merged into Sunkist. Since the parties have agreed that these changes in no way affect the issue here, we discuss Sunkist in its post-1958 form.

ment, he is to pay to the packing house $2.50 per ton of fruit released.

Each of the local associations, including the private packing house agency associations, contracts with its district exchange and with Sunkist Growers, Inc., to market all of its fruit—product and fresh—in the Sunkist system. Each association, under the Sunkist-District Exchange-Association Agreement, reserves the right to decide to what market it will ship and what price it is willing to receive for its fruit; however, Sunkist may decide to pool product fruit and fruit for export, in which event that fruit is handled solely in Sunkist's discretion. Sunkist also determines "the maximum amount of fruit to be marketed currently," and allocates the "opportunity to ship equitably among Associations." Each local association agrees not to release any of its growers from the marketing contract without notifying its district exchange and Sunkist, and must obtain the approval of both if releases total more than 5% of the volume of the particular variety of fruit handled by the association. Further, each district exchange and local association agrees that "all prices, quotations and allowances shall be issued and distributed solely by Sunkist."

Petitioner Case-Swayne manufactures single-strength orange juice and other blended orange juices. In its complaint, insofar as relevant to the issues here, petitioner charged that the Sunkist system was a conspiracy in restraint of trade in violation of § 1 of the Sherman Act, the effect of which was to limit sharply the supply of product citrus fruit available to petitioner during the period covered by the complaint.

II.

Section 1 of the Capper-Volstead Act (see n. 2, *supra*) privileges collective activity in processing and marketing on the part of "persons engaged in the production of

agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers . . . ." 42 Stat. 388, 7 U. S. C. § 291. Despite that specific language, Sunkist argues that Congress, in enacting the measure, intended to give sanction to any organizational form by which the benefits of collective marketing inured to the grower; and that, because the agency packing houses, by charging cost plus a fixed fee [5] for their services, do not participate directly in the gain or loss involved in the collective marketing of fruit through the Sunkist system, they are in the Sunkist system a privileged form of organization for the growers who contract with them.[6] We think that argument misconceives the requirements of the Act and runs counter to the relevant legislative history.

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[5] Under the marketing contract, the agency packing house obtains for its services "all of its costs of every kind incurred in connection with" processing and marketing the fruit; the so-called "fixed fee," in the contract in this record, is an amount "not in excess of 5 cents per field box on grapefruit, 10 cents on oranges," etc. We are not advised how that fixed fee is determined, other than that it is the result of bargaining between the company and the grower. It may well be that the fixed fee is dependent on the benefits of collective marketing through Sunkist, in the limited sense that it represents to the parties what one can charge and the other can pay, both anticipating the return the grower may achieve through pooling his fruit with the Sunkist organization. The stipulation, we note, provides only that the agency association "does not itself participate in either the gain or loss involved in marketing fruit through Sunkist *beyond* the recovery of its costs and fixed fee for packing." (Emphasis added.) In our view, however, that discrepancy in the record is not crucial to the decision here.

[6] The majority below held that the issue here was resolved *sub silentio* in favor of Sunkist in *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 370 U. S. 19 (1962). But nongrower participation in Sunkist was neither pointed out nor the issue raised in that case; indeed, it was conceded by the respondent there that Sunkist was a Capper-Volstead cooperative.

Congress enacted § 6 of the Clayton Act in response to the urgings of those who felt the Sherman Act's prohibition against combinations in restraint of trade might be applied to imperil the development of cooperative endeavors, principally unions.[7] That section provided that the antitrust laws were not to be "construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit," *i. e.*, such organizations were not to be deemed "illegal combinations or conspiracies in restraint of trade . . . ." 38 Stat. 731, 15 U. S. C. § 17. From the standpoint of agricultural cooperatives, the principal defect in that exemption was that it applied only to nonstock organizations. The Capper-Volstead Act was intended to clarify the exemption for agricultural organizations and to extend it to cooperatives having capital stock.[8]

The reports on both H. R. 13931, the predecessor bill that failed of passage, and H. R. 2373, which became the Capper-Volstead Act, state:

> "Section 1 defines and limits the kind of association to which the legislation applies. These limitations are aimed to exclude from the benefits of this legislation all but *actual farmers* and all associations not operated for the mutual help of their members *as such producers.*" (Emphasis added.) H. R. Rep. No. 24, 67th Cong., 1st Sess., 1 (1921); H. R. Rep. No. 939, 66th Cong., 2d Sess., 1 (1920).

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[7] See H. R. Rep. No. 627, 63d Cong., 2d Sess. 14–16 (1914); *Allen Bradley Co.* v. *Local No. 3*, 325 U. S. 797 (1945).

[8] The purpose and object of the limited exemption of the Capper-Volstead Act is fully discussed in *Maryland & Virginia Milk Producers Assn.* v. *United States*, 362 U. S. 458, 464–468 (1960); see also Hanna, Antitrust Immunities of Cooperative Associations, 13 Law & Contemp. Prob. 488 (1948).

That it was intended that only actual producers of agricultural products be covered by the legislation is demonstrated in the debates on the two bills, *e. g.*, the following exchange involving Senator Kellogg, a principal sponsor of the measure:

> "Mr. CUMMINS. . . . Are the words 'as farmers, planters, ranchmen, dairymen, nut or fruit growers' used to exclude all others who may be engaged in the production of agricultural products, or are those words merely descriptive of the general subject?
>
> "Mr. KELLOGG. I think they are descriptive of the general subject. I think 'farmers' would have covered them all.
>
> "Mr. CUMMINS. I think the Senator does not exactly catch my point. Take the flouring mills of Minneapolis: They are engaged, in a broad sense, in the production of an agricultural product. The packers are engaged, in a broad sense, in the production of an agricultural product. The Senator does not intend by this bill to confer upon them the privileges which the bill grants, I assume?
>
> "Mr. KELLOGG. Certainly not; and I do not think a proper construction of the bill grants them any such privileges. The bill covers farmers, people who produce farm products of all kinds, and out of precaution the descriptive words were added.
>
> "Mr. TOWNSEND. They must be persons who produce these things.
>
> "Mr. KELLOGG. Yes; that has always been the understanding."[9]

[9] 62 Cong. Rec. 2052 (1922). See also 60 Cong. Rec. 369 (1920) (remarks of Senator Lenroot). It is significant that an amendment was offered on the floor of the Senate to bring within the bill processors of agricultural products where the grower's return depended upon the price the processor obtained for the finished

To be sure, a principal concern of Congress was to prohibit the participation in the collectivity of the predatory middleman, the speculator who bought crops in the field and returned but a small percentage of their eventual worth to the grower. Sunkist focuses on the expression of that concern, urging that the agency associations are not such predatory middlemen. That focus is wide of the mark. We deal here with "special exceptions to a general legislative plan," *Allen Bradley Co.* v. *Local No. 3*, 325 U. S. 797, 809 (1945) (§ 6 of the Clayton Act), and therefore we are not justified in expanding the Act's coverage, which otherwise appears quite plain. The Act states those whose collective activity is privileged under it; that enumeration is limited in quite specific terms to producers of agricultural products.[10]

Nor does the proviso in § 1—"that such associations are operated for the mutual benefit of the members thereof"—broaden the earlier language. That provision, in conjunction with the other prerequisites for qualification

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product, reference being made to the beet sugar manufacturer. 62 Cong. Rec. 2273 (1922). Like Sunkist's argument here, it was stated that "the beneficiary of this [amendment] would be the producer." *Id.*, at 2274. But as Senator Norris stated in opposition to the inclusion of the processors (*id.*, at 2275):

"They are not cooperators; they are not producers; it is not an organization composed of producers who incorporate together to handle their own products . . . ."

The amendment was rejected. *Id.*, at 2275, 2281.

[10] See Hulbert, Legal Phases of Farmer Cooperatives 170 (U. S. Dept. of Agriculture, FCS Bull. No. 10, 1958):

"This and other language which appears in the act make it plain that a cooperative, to come within the act, must be composed of producers."

See also Hulbert, Legal Phases of Cooperative Associations 45 (U. S. Dept. of Agriculture, FCS Bull. No. 1106, 1922); Mischler, Agricultural Cooperative Law, 30 Rocky Mt. L. Rev. 381, 385 (1958); 36 Op. Atty. Gen. 326, 339 (1930); Note, 44 Va. L. Rev. 63, 69–70, 100 (1958).

under the Act—that either each member be limited to one vote without regard to the capital he furnished or that dividends on capital be limited to 8%, and that dealings in products of nonmembers be limited—was designed to insure that qualifying associations be truly organized and controlled by, and for, producers. In short, Congress was aware that even organizations of producers could serve a purpose other than the mutual obtaining of a fair return to their members, as producers, or be controlled by persons other than producers, and the proviso adds a measure of insurance that such organizations do not gain the Act's benefits.[11] Moreover, virtually the only mention in the legislative history of possible participation in a Capper-Volstead cooperative by nonproducers occurs with respect to cooperatives issuing capital stock.[12] Whatever may be the effect and significance of that recognition of the financial stake of nonproducers in an otherwise solely producer organization, their participation and role being narrowly restricted by the voting and dividend prerequisites of the Act, it is unpersuasive here. Capital participation by non-

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[11] Cf. *Sheffield Farms Co.*, 44 F. T. C. 555 (1948); *Gold Medal Farms, Inc.*, 29 F. T. C. 356 (1939).

[12] *E. g.*, 62 Cong. Rec. 2271 (1922); 60 Cong. Rec. 365 (1920). Sunkist—a membership, rather than stock, corporation—points out that it, then known as the California Fruit Growers Exchange, was favorably referred to during the debates, see, *e. g.*, 62 Cong. Rec. 2052, 2267, 2271, 2277 (1922); 60 Cong. Rec. 312, 315, 360–361, 370 (1920). There is nothing to show, however, that Congress was aware that nonproducers participated in the marketing of fruit in the Sunkist system; in our reading of those references, it is more likely that Congress assumed the organization was solely of producers. For that matter, Senator Walsh, for one, doubted that the Exchange's federation of cooperative associations would even be encompassed by the Act (62 Cong. Rec. 2277–2278). In any event, we cannot take those remarks as intending specific approval of Sunkist, in light of the language of the Act and its other history.

producers—and that is the extent to which the debates can fairly be read as contemplating their participation at all [13]—does not directly enlarge the market share already possessed by the producers themselves. The participation in Sunkist of the agency associations has precisely that effect.

Sunkist suggests that "membership" of the agency associations has no "economic significance," relying on that provision of the Capper-Volstead Act permitting an association to deal in the products of nonmembers. The argument is that if the agency packing houses were not members of the Sunkist system, Sunkist would still be free to handle their products. But this Court has held that the antitrust implications of the relationship between a cooperative association and others is governed by entirely different standards. "The right of . . . agricultural producers thus to unite [under the Act] . . . cannot be deemed to authorize any combination or conspiracy with other persons in restraint of trade that these producers may see fit to devise." *United States* v. *Borden Co.*, 308 U. S. 188, 204–205 (1939); accord, *Maryland & Virginia Milk Producers Assn.* v. *United States*, 362 U. S. 458, 466–467 (1960). Moreover, the agency associations participate in the control and policy making of Sunkist, even though they may be private profit-making operations.[14] We think Congress did not intend to allow

[13] It was recognized, for example, that producers who desired to organize for collective marketing might not have, at the outset, the necessary finances to do so, and might therefore seek capital from nonproducers. See 60 Cong. Rec. 365 (1920) (remarks of Senator Walsh); 62 Cong. Rec. 2271 (1922) (same); 62 Cong. Rec. 2273 (1922) (remarks of Senator Norris). See also Hearings on H. R. 2373 before a Subcommittee of the Senate Judiciary Committee, 67th Cong., 1st Sess. (1921).

[14] As such, the agency association's interests may in some situations be antithetical to those of the growers with which it has

an organization with such nonproducer interests to avail itself of the Capper-Volstead exemption.[15]

The judgment below is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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contracted. For example, Sunkist has the power to review contracts between growers and the agency associations. Obviously, to the extent that the agency associations are represented in the councils of Sunkist, they in effect review their own contracts.

[15] All we decide is that Sunkist Growers, Inc., is not entitled to assert Capper-Volstead as a defense to the suit based on § 1 of the Sherman Act. We express no views on the merits of that suit.

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No. 66.—October Term, 1967.

Case-Swayne Company, Inc., Petitioner, *v.* Sunkist Growers, Inc. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[December 18, 1967.]

Mr. Justice White, with whom Mr. Justice Stewart joins, concurring in the result.

I agree with the Court's basic judgment that Congress intended to grant immunity from the antitrust laws only to the cooperative efforts of "[p]ersons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers . . . ." Arrangements between growers and nongrowers are subject to scrutiny under the antitrust laws. Under the controlling decisions any combination between Sunkist and nongrower packing houses, were they not members of Sunkist, would have to meet the standards of the antitrust statutes. *United States* v. *Borden Co.*, 308 U. S. 188 (1939). Making the nongrower a member of the cooperative should not and does not immunize grower-nongrower transactions from any of the antitrust laws. Despite such membership, these transactions continue to be forbidden if they violate § 1. Indeed, membership should itself be looked upon as an agreement or combination between growers and nongrowers which, if it restrains trade, is subject to suit under the Sherman Act. Hence, since the complaint in this case encompassed a charge that certain arrangements between Sunkist and the nongrower agency associations denied product fruit to Case-Swayne and violated the antitrust laws, I agree that it was error to dismiss the § 1 charge on immunity grounds.

But it does not follow that Sunkist has lost its antitrust immunity completely. The bulk of its members are grower cooperatives or marketing agencies, and the great majority of its transactions are dealings with and for the account of these agricultural cooperatives which Congress clearly intended to exempt from the antitrust laws. An exempt organization may not conspire with an outsider to violate § 1, but if it does, it does not forfeit its immunity except for that transaction. I see no reason for a different consequence where the conspiracy or combination takes the form of granting membership in the exempt organization. If nongrower membership is a combination in restraint of trade or if any agreements between Sunkist and the nongrower member violate the Sherman Act, Case-Swayne should be able to collect treble damages for any injury flowing from such violations. But I see little basis for concluding that the membership of the agency association strips Sunkist of its status as an exempt cooperative and exposes it to what would be very extensive liability under the antitrust laws wholly unrelated to the nongrower affiliation.

At the base of the Sunkist organization are 12,000 growers who themselves are not members of Sunkist but who are members of local associations which operate packing houses and which pick, pack, and arrange for the marketing of the fruit grown by their members. Most of these local associations appear to qualify as exempt agricultural cooperatives. A relatively small number, however, the so-called agency associations, are privately owned packing houses which buy and pack the fruit of those growers with whom they contract. The local associations, including the agency associations, are in turn organized into district exchanges which, unless agency association membership disqualifies some of them, would seem also to be exempt cooperatives. The district

exchanges are primarily marketing organizations. Sunkist, a member corporation, is at the top of the pyramid. Among other things, it has ultimate authority and responsibility for the marketing of both fresh and product fruit.

Membership in Sunkist is made up of the local associations and the district exchanges. The agency associations make up about 15% of the membership. They have, however, no direct voice in the election of Sunkist directors since the selection of directors is vested in the exchange members alone. The directors have very wide authority to conduct the affairs of Sunkist. Under the charter and bylaws, general membership carries with it little power and influence. Membership does, however, involve the execution of a membership application and agreement binding the member to Sunkist's charter and bylaws, which give Sunkist extensive powers over the marketing of its members' fruit, including the power to confine the packing, processing, and marketing functions to the Sunkist family. In addition, local associations and exchanges apparently execute the standard "Sunkist-District Exchange-Association Agreement" which, among other things, contains the agreement by the local association to market fruit exclusively through the exchanges and by the exchange to market exclusively through Sunkist.

If Sunkist's exemption is completely lost because of the membership of the nongrower agency associations, several consequences follow. Those district exchanges which have nongrower members will likewise forfeit their exemption. The arrangements among Sunkist, exempt exchanges, and exempt local associations will be looked upon as arrangements between exempt and nonexempt organizations. Thus for all practical purposes the entire Sunkist structure will be exposed to antitrust liability for a great many transactions which are wholly between growers or between their cooperative organizations, trans-

actions which Congress intended to exempt from the antitrust laws.

Neither the agency associations themselves nor their arrangements with growers are claimed by Sunkist to be Capper-Volstead cooperatives exempt because of that status from examination under the Sherman Act. Also, the contracts and arrangements between the agency associations, nonexempt entities, and the exchanges and Sunkist, which should be treated as otherwise exempt entities, are themselves within the reach of § 1. Among these nonexempt arrangements is the membership of an agency association in either an exchange or Sunkist itself. Case-Swayne should be able to recover from Sunkist those damages which flow from restraints of trade resulting from the agreements between the agency associations and Sunkist or between the agency associations and the district exchanges and from the membership of the agencies in either Sunkist or the exchanges. But Case-Swayne should not recover for injury to its business caused by other intercooperative or intergrower transactions and not resulting from the forbidden relationship between an exempt and a nonexempt entity. This result, in my view, will more nearly serve the policy of Congress in granting antitrust exemption to growers and their cooperative activities.

I would remand to the District Court for a trial of the § 1 case under the above principles.

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[December 18, 1967.]

Mr. Justice Harlan, concurring in part and dissenting in part.

I agree with the Court's holding that Congress did not intend that nonstock organizations with nonproducer members should qualify for the antitrust exemption conferred by § 1 of the Capper-Volstead Act, 7 U. S. C. § 291, and that the Sunkist system therefore is technically not a properly constituted Capper-Volstead cooperative. However, like my Brother White, I am unable to ignore the possible effect of the Court's holding insofar as it subjects this large agricultural organization to antitrust liability extending far beyond the confines of this suit.

There is nothing in the record to indicate that Sunkist intended to evade the mandate of the Capper-Volstead Act when it allowed privately owned "agency association" packing houses to become members of the Sunkist system. Sunkist's only apparent motive in including the agency associations as members was to provide a greater range of packing facilities for citrus growers who desired to market through Sunkist. The agency associations have been an integral part of the Sunkist system for many years.[1] Until the bringing of the present action,

[1] It appears that the agency associations have been members of the system at least since 1924. See McKay & Stevens, Organization and Development of a Cooperative Citrus-Fruit Marketing Agency 22–23 (U. S. Dept. of Agriculture, Bull. No. 1237, 1924).

this aspect of Sunkist's organization had apparently gone without challenge from private persons who dealt with Sunkist. Its legality never seems to have been questioned by any agency of government. Sunkist argued before us, without challenge to its sincerity, that the membership of the agency associations did not deprive it of antitrust immunity so long as all of its actions were taken for the benefit of the growers. There is no reason to doubt that this has been Sunkist's belief through the years.

In these circumstances, it seems inequitable that the membership of the agency associations should cause Sunkist to lose all of its previously assumed immunity from liability under § 1 of the Sherman Act. This would evidently be the consequence of the Court's holding, and if not mitigated in any way it would appear to expose Sunkist to very large liabilities. Many of the activities of a marketing organization the size of Sunkist presumably amount to restraints of trade, and under the Court's rationale Sunkist would be subject to treble damage suits in respect of all of them. The chief result would be to allow windfall treble damage recoveries to persons with whom Sunkist dealt at arm's length and in good faith. The main burden would ultimately fall on the growers at the base of the Sunkist organization.

I would hold that Sunkist is not liable under § 1 of the Sherman Act for past acts merely because the agency associations participated in its government by virtue of their membership. It seems to me that this result is not only more equitable but accords better with the basic purpose of Congress, which was to aid producers, than does the Court's holding, which burdens the growers with heavy potential liabilities. This belief is supported by the frequent reference in the congressional debates to the forerunner of this very organization as

one which Congress intended by the Act to protect.[2] Sufficient precedent for this type of equitable mitigation is found in *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Prods. Co.*, 370 U. S. 19, in which this Court held that Sunkist's former "tripartite" structure did not deprive it of its § 1 immunity. The Court there stated that

> "To hold otherwise would be to impose grave legal consequences upon organizational distinctions that are of *de minimis* meaning and effect to these growers who have banded together for processing and marketing purposes within the purview of the Clayton and Capper-Volstead Acts." *Id.*, at 29.

The very words of Capper-Volstead § 1, however, make it clear that Congress granted antitrust immunity to agricultural cooperatives only on condition that all of the benefits of cooperative organization were received by agricultural producers. Therefore, I would also hold that Sunkist may not assert antitrust immunity if the damage complained of resulted from attempts by the agency associations to use their power within Sunkist for their own benefit as distinguished from that of the growers.

The Court holds, and, as respects the future, I agree, that even those organizations in which all gains are channeled to the producers may not qualify under Capper-Volstead § 1 if they have nonproducer members. Congress may have excluded nonproducers simply because it felt that the benefits to producers from nonproducer membership were outweighed by the dangers of admitting nonproducer foxes into the cooperative hen roost. However, as the Court recognizes, see p. —, *ante*, the evident congressional concern about the possibility of monopoly by organizations immunized from

[2] See p. —, n. 12, *ante*.

antitrust prosecution by Capper-Volstead[3] indicates that in restricting membership to producers Congress also intended to limit in a rough way the amount of market power which could be controlled by such organizations. The resources of nonproducers were to be available to the cooperatives not through the broad avenue of membership but by the narrower path of contract: the Act provides that qualifying organizations and their members "may make the necessary contracts and agreements" to effect the Act's purposes. To give effect to this legislative intent, I would hold that the marketing agreements of the agency associations with Sunkist and with individual growers must be tested by the standard applicable to contracts with nonmembers.

The Court of Appeals held that, treated as contracts with nonmembers, the agreements in question were proper under the Act. 369 F. 2d 449, 461–462. I agree. Regarded as contracts, these agreements provide essentially that a grower who desires to market through the Sunkist system and have his fruit packed by an agency association shall deliver to such association his entire crop for the year, that the agency association shall pack it in return for cost plus a fixed fee, and that the entire crop shall then be marketed by Sunkist. The contract may be canceled by the grower in August of any year. Since the main effect of these agreements is simply to give the growers who want to market through Sunkist a wider choice of packing facilities than they would enjoy if limited to cooperative packing houses, I would hold that the agreements are permissible when looked upon as contracts with nonmembers.

In accord with this opinion, I would remand the case to the District Court so that Case-Swayne may show what, if any, of the damage allegedly suffered by it re-

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[3] See, *e. g.*, 62 Cong. Rec. 2217–2226, 2257–2280.

sulted from actions taken by the agency associations for their own benefit as distinguished from that of the growers. I need hardly say that for the future Sunkist would forfeit its entire Capper-Volstead antitrust exemption were it to elect to continue the membership of the agency associations.

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Mr. Justice Douglas, dubitante.

I am not as certain as Mr. Justice White appears to be that the immunity of the growers or cooperatives granted by the Capper-Volstead Act is only partially lost in case nongrowers combine with the growers or cooperatives. But the question is certainly not free of doubt and it has not been argued. Nor have the questions discussed by Mr. Justice Harlan been fully presented and argued. So far as we can tell at this stage of the litigation, all of those problems may turn out to be wholly abstract. The extent, let alone the nature, of participation by nongrower elements in the agreements and practices alleged to violate the antitrust laws has indeed hardly been explored. Therefore I think it is the part of wisdom specifically to reserve the questions with regard to the scope of the immunity that may survive today's ruling.